

## Essay

# Nuclear Arsenals, International Lawyers, and the Challenge of the Millennium

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My considered opinion is that the use or threat of use of nuclear weapons is illegal in any circumstances whatsoever. It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925, and Article 23(a) of the Hague Regulations of 1907. It contradicts the fundamental principle of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.

I regret that the Court has not held directly and categorically that the use or threat of use of the weapon is unlawful in all circumstances without exception. The Court should have so stated in a vigorous and forthright manner which would have settled this legal question now and forever.

—Judge Weeramantry, Dissenting Opinion, International Court of Justice: Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*<sup>1</sup>

In my view, it is wholly incoherent in the light of the material before the Court to say that it cannot rule definitively on the matter now before it in view of the current state of the law and because of the elements of facts at its disposal, for neither the law nor the facts are so imprecise or inadequate as to prevent the Court from reaching a definitive conclusion on the matter. On the other hand, the Court's findings could be construed as suggesting either that there is a gap, a lacuna, in the existing law or that the Court is unable to reach a definitive conclusion on the matter because the law is imprecise or its content insufficient or that it simply does not exist. It does not appear to me any new principles are needed for a determination of the matter to be made. All that was requested of the Court was to apply the existing law. A finding of *non liquet* is wholly unfounded in the present case. The Court has always taken the view that the burden of establishing the law is on the Court and not on the Parties.

—Judge Koroma, Dissenting Opinion, International Court of Justice: Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*<sup>2</sup>

## I. INTRODUCTION

As we approach the end of the twentieth century, a remarkable yet extraordinarily tragic and bloody century, we are given to flashbacks of events of truly millennial salience, among them the Manhattan Project and the development of the atom bomb. The image of a mushroom cloud of immense destructive capacity is complemented by the knowledge that under that cloud were the citizens of Hiroshima and Nagasaki, the first victims of the atomic age. The disturbing image of a vaporized human being etched in rock near the epicenter of the bomb blast in Hiroshima remains a permanent legacy of the human impact of an atomic blast. This is an image that both rivets and disturbs those who now visit the bomb site. It is a haunting and disturbing warning about the threat posed by nuclear weapons; a threat that bespeaks vaporized humanity as a casualty of thermonuclear war.<sup>3</sup>

1. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 433 (July 8) (Weeramantry, J., dissenting).

2. *Id.* at 557–58 (Koroma, J., dissenting).

3. In 1991 the author visited Japan as part of a U.S. delegation of Amnesty International to attend an International Council Meeting of the organization. As part of this visit, the author was asked to give a public lecture on the question of human rights and the problems of nuclear arsenals. Winston Nagan & Francis McCarthy, Hiroshima 1945–1995: Peace, Human Rights, and the Nuclear Weapons

A tragic irony exists in the use of nuclear weapons on the cities of Hiroshima and Nagasaki. The bombings occurred at the end of a war in which the aggressor states (Germany and Japan) were frequently charged with the most flagrant violations of the rules relating to the *ius ad bellum* and the *ius in bello*.<sup>4</sup> Nazi and Japanese aggression was expressed as conquest and fueled claims that the rules that seek to restrain war, as well as the conduct of war, were obsolete. The Axis powers were thought to use the idea of "total war" as a stratagem for world domination and conquest. The irony lies in the fact that nuclear weapons were first used by the Allied Powers, and these weapons now represent forms of total war far in excess of what the Axis powers might have imagined. The use of these weapons apparently did not permit the use of reasoned judgment based on the traditional legal values (i.e., the principles of necessity, proportionality, or humanitarianism) embedded in the *ius in bello*.

The irony is heightened when we view the situation in hindsight. The processes of war and humanitarian disaster that characterized World War II provided an immense impetus for the creation of a rule of law for global society based on firm international constitutional precepts. The instrument for world order, which became the foundation for the organization of international society, was the United Nations Charter. The core constitutional values of the Charter arose out of a desire to ban aggressive war and to vigorously integrate rules of humanitarianism with a renewed interest in the moral and juridical status of basic, universal human rights.<sup>5</sup>

The regime created under the Charter system was further enhanced by the United Nations's affirmation of the Nuremberg convictions.<sup>6</sup> These convictions were a vigorous assertion of the vitality of *ius in bello* and *ius ad bellum*. The principles emphasized at Nuremberg incorporated not only state, but also individual, responsibility. The evolution of international law through Nuremberg and the Charter system stands today in stark contrast to the threat

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Crisis, Address before the Hiroshima Adoption Group of Amnesty International (Aug. 8, 1991) (on file with *The Yale Journal of International Law*). The speech was subsequently revised in 1995 with the assistance of Francis McCarthy. The author also visited the epicenter of the bomb site. In the speech, the author suggested that it would have been appropriate for the U.S. government to express some form of apology for its use of the bomb on the cities of Hiroshima and Nagasaki. Such an apology, he believed, would not detract from other wrongs done by all participants during World War II.

4. For an overview from the perspective of a military lawyer on the law of armed conflict, see A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* (1996). For an overview of the use of force in international relations, with a specific emphasis on the precepts relating to the initiation of coercion, see NATIONAL SECURITY LAW 85-191 (John Norton Moore et al. eds., 1990). This section of the work covers issues relating to the basic framework of the U.N. Charter, the problems of intervention, the issues reflecting traditional customary law principles, the role of self-defense, humanitarian law, and the problems of internal conflict. For an overview of the literature relating specifically to law and nuclear weapons, see *id.* at 485-668. On *ius in bello* and *ius ad bellum*, see THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Michael Howard et al. eds., 1994).

5. See U.N. CHARTER art. 1, para. 3.

6. See Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95, U.N. GAOR, 1st Sess., at 1144, U.N. Doc. A/236 (1946).

posed by the weapons of mass destruction that now threaten the survival of humanity and civilization.

In 1996, the International Court of Justice (ICJ) issued an advisory opinion on the lawfulness of the threat and/or use of nuclear weapons.<sup>7</sup> The impetus for the opinion came from an unlikely source: the World Assembly of the World Health Organization (WHO).<sup>8</sup> The WHO's request was accompanied by a similar request from the U.N. General Assembly.<sup>9</sup> Coming at the threshold of the millennium, the opinion represents a milestone in the international law discourse about nuclear weapons. The opinion of the ICJ represents the complexities inherent in the framing of a proper juridical role for the court. This general issue, seen from the perspectives of both majority and dissenting views, is an important discourse that may transcend the definition and boundary of the proper role of the ICJ, and speaks to a larger and indeed vital question: the nature, role, and even identity of the future international lawyer. Obviously, the opinion does not address this question directly. However, when the opinion is seen within the broader context of the development of international law since 1945, this central issue permeates the discourse about the lawfulness of the threat and/or use of nuclear weapons.

The issue about the nature, role, and identity of the future international lawyer is inextricably tied to one of the most important judicial questions in the Grotian tradition of modern international law.<sup>10</sup> This is the problem of law's appropriate relation to state power and the extent to which law and legal culture might constrain the exercise of power through reasoned elaboration, understanding, and intervention. In short, the advisory opinion raised a

7. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8). For an assessment of the opinion's impact, its political import, and its pedagogic salience, see Richard A. Falk, *Nuclear Weapons, International Law, and the World Court: A Historic Encounter*, 91 AM. J. INT'L L. 64 (1997). Falk sees the advisory opinion in a positive light. See *id.* at 75. Falk concludes that the court's decision is a plausible construct of international law, but not the "only plausible" conclusion. *Id.* at 73; see also Judith Hippler Bello & Paul C. Szasz, *Addendum: The Vote in the General Assembly*, 91 AM. J. INT'L L. 133 (1997) (questioning the ICJ's jurisdiction to hear the case); Judith Hippler Bello & Peter H. Bekker, *Legality of the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 126 (1997) (summarizing the ICJ opinion).

8. See World Health Assembly Res. 46.40, WHO 46th Ass., 13th mtg. (1993). For a detailed analysis of the background of the WHO request, see Nicholas Rostow, *The World Health Organization, The International Court of Justice, and Nuclear Weapons*, 20 YALE J. INT'L L. 151 (1995). See also Peter Weiss et al., *Draft Memorial in Support of the Application by the World Health Organization for an Advisory Opinion by the International Court of Justice on the Legality of the Use of Nuclear Weapons under International Law, Including the W.H.O. Constitution*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 721 (1994) (arguing that the use of nuclear weapons breaches the WHO Constitution). On the dismissal of the WHO's request, see Bello & Szasz, *supra* note 7, at 134-38.

9. See G.A. Res. 49/75K, U.N. GAOR, 49th Sess., Supp. No. 49, at 71, U.N. Doc. A/49/49 (1995).

10. Hugo de Groot, more popularly known as Grotius, is regarded as the father of modern international law. The landmark work for which he is justly honored is *De Jure Belli ac Pacis*. HUGO GROTIUS, *DE JURE BELLI AC PACIS* [THE LAW OF WAR AND PEACE] (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1625). In the context of emerging conceptions of self-determined sovereignty, Grotius sought to develop a coherent conception of an international community subject to the rules of reason and law. The Grotian tradition is commonly seen as providing a compelling juridical basis for the idea of a comprehensive legal obligation predicated upon a rule of law and founded on principles of reason, rationality, and moral ordering. See H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 18-21 (1946).

threshold question of whether matters of national security—within which are strategically deployed nuclear arsenals—are political and hence beyond the cognizance of the institutional constraints of juridical elaboration and normative guidance.

The remainder of this Essay is split into five parts. Part II examines the conflicts inherent in international law, nuclear weapons, and national security. It then explores the role of international lawyers in the post-Cold War nuclear age. Part III outlines the evolution and structure of the discourse about the legal status of nuclear weapons, looking first at problems emerging from both the use and testing of nuclear weapons. Then, it explores the role small states have played in this discourse through their development of nuclear weapon-free zones. Part IV examines the conceptual basis of the treaty-based regime relating to nuclear weapons as it relates to the legal expectations of the key nuclear powers, as well as the conceptual basis of the treaty regime of nonproliferation. Finally, Part V analyzes the advisory opinion against the background of preexisting law and seeks both to defend the role of the court and to give support to the explicitly Grotian-influenced analysis of international law provided by Judge Weeramantry's dissent. Here the analysis focuses on the dissenting Judge's interpretation of the key concepts underlying the international constitutional system and the implications for continued discourse on this vital issue. Part VI concludes.

## II. FOCUSING THE INQUIRER'S LENS: LAW, SECURITY, AND NUCLEAR WEAPONS

### A. *Law and the Arms Race in Conflict*<sup>11</sup>

The end of World War II saw the world with a single nuclear power—the United States. The detonation of bombs in Hiroshima and Nagasaki symbolically ended the age of conventional war and began the age of nuclear weapons. In the ensuing distribution of nuclear power, Stalin's Soviet Union made great efforts to match the nuclear capability of the United States. This resulted in what is commonly called the "arms race," an important by-product of the Cold War.<sup>12</sup>

The arms race resulted in the vast growth of the nuclear arsenals of the Great Powers. Against this reality, two competing paradigms emerged. The first emphasized national self-defense, justifying the balance of nuclear terror and evolving into the doctrine of Mutually Assured Destruction (MAD).<sup>13</sup> The

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11. The ethical and moral aspects of international relations and world order are analyzed in *POLITICAL REALISM AND INTERNATIONAL MORALITY: ETHICS IN THE NUCLEAR AGE* 11–75 (Kenneth Kipnis & Diana T. Meyers eds., 1987) [hereinafter *POLITICAL REALISM*].

12. See generally HERBERT F. YORK, *RACE TO OBLIVION: A PARTICIPANT'S VIEW OF THE ARMS RACE* (1970) (detailing the absurdity of the arms race from an insider's perspective).

13. On the morality of nuclear deterrence, see *POLITICAL REALISM*, *supra* note 11, pt. 2, at 105–80 (collecting essays on the ethics of nuclear deterrence). Especially relevant are the essays of

second paradigm emerged from an appreciation of the threat nuclear weapons posed to the survival of humanity. This paradigm emphasized the need for international regulation and progressive disarmament.

The testing, production, deployment, and possible use of nuclear weapons became the exclusive province of national sovereigns, giving primary decision-making responsibility to the national security specialists. Even as other agencies of international decision-making, such as the U.N. General Assembly and Security Council, became concerned about the nuclear weapons issue, a relatively discrete set of treaty-based perspectives (such as the Test Ban Treaty<sup>14</sup>) began to emerge based primarily on the understandings of those states who monopolized nuclear weapons arsenals. However, the general framework of international legal perspectives remained in some measure insulated from the *lex specialis* generated by the expectations of the "nuclear club." This in turn created an incentive on the part of non-nuclear powers to join the "club," a fact that ushered in the nightmare scenario of the uncontrolled proliferation of nuclear weapons. States wanting to join the club would invoke the ritual words that their bomb was for "peace."

The evolution of this *lex specialis* arises in tension with the principles embodied in the U.N. Charter. In particular, the efforts to outlaw aggression, the international regulation of the deployment of armed forces, and developments in humanitarian law, human rights, and environmental law posed a distinctive challenge to the superpower-conditioned treaty-based regime. All these developments evolved under the brooding omnipresence of the nuclear mushroom cloud.<sup>15</sup>

It is widely recognized today that disarmament as a policy of international law is an important strategic way to promote peace and security. For example, this principle was instrumental in both the Strategic Arms Limitations Talks process and the Anti-Ballistic Missile Treaty.<sup>16</sup> It is also accepted that nuclear deterrence as an instrument for maintaining a balance of terror to ensure peace and security has become discredited.<sup>17</sup> The critical task

Leslie Pickering Francis, *Nuclear Threats and the Imposition of Risks*, in *POLITICAL REALISM*, *supra* note 11, at 153, and Richard Werner, *The Immorality of Nuclear Deterrence*, in *POLITICAL REALISM*, *supra* note 11, at 158.

14. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43 (entered into force Oct. 10, 1963).

15. The mushroom cloud has itself been a symbol of controversy. It has been conventionally viewed as a symbol of the prospect of human extinction. However, it has also been seen as a cloud of peace. See ROBERT JAY LIFTON & ERIC MARKUSEN, *THE GENOCIDAL MENTALITY: NAZI HOLOCAUST AND NUCLEAR THREAT* 51 (1990) ("This great iridescent cloud and its mushroom top . . . is actually a protective umbrella that will forever shield mankind everywhere against the threat of annihilation in any atomic war." (quoting William Laurence, U.S. government spokesperson for the hydrogen bomb project)).

16. For a summary of the SALT process and the ABM Treaty, see John B. Rhinelander, *Arms Control in the Nuclear Age*, in *NATIONAL SECURITY LAW*, *supra* note 4, at 551, 587-602. For an appreciation of the movement toward reduction of nuclear arsenals and the principles involved in facilitating this process, see Ronald F. Lehman II, *Measures to Reduce Tension and Prevent War*, in *NATIONAL SECURITY LAW*, *supra* note 4, at 641.

17. See LIFTON & MARKUSEN, *supra* note 15, at 1-8; cf. Nuclear Proliferation Prevention Act of 1994, Pub. L. No. 103-236, § 821, 108 Stat. 507, 508-11 (1994) (codified as amended at 22 U.S.C.A. § 6303 (West Supp. 1998)) (giving the U.S. President authority to impose sanctions on countries that

for international lawyers is to structure an informed discourse in which the strategies, tactics, and fundamental principles of security, peace, and disarmament might be more effectively implemented in accordance with the promise of the U.N. Charter. It will therefore be useful to review the legal odyssey that international lawyers have traveled to determine what practical suggestions might emerge to secure the banishment of nuclear weapons.

#### B. *International Lawyers and the Nuclear Age*

On August 6, 1995, the world celebrated the fiftieth "jubilee" of the atom bomb's use on a human population.<sup>18</sup> In that same year, the world also celebrated the fiftieth Jubilee of the International Court of Justice.<sup>19</sup> These separate, but not unrelated, events posed a problem of the most profound importance for world order. The bomb was and continues to be an expression and projection of power in international relations. The ICJ, through the process of deliberation and adjudication, was and continues to be an expression of reason in world order. At whatever level we conceptualize law, the ICJ's most fundamental challenge is one of making power and expediency subject to the rule of reason and the rule of law.

Since the momentous events of 1945, the most crucial, defining element of international relations has been the production, distribution, and threatened use of nuclear weapons.<sup>20</sup> Indeed, while the promise of a new world order was

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spread nuclear weapons technology).

18. On August 6, 1945, the atomic bomb was first dropped on the city of Hiroshima. More than 66,000 deaths were a direct result of the explosion and fire storm. About 80 percent of the structures in Hiroshima were destroyed. The energy released from the bomb is estimated to have been equivalent to that released from the explosion of 14,000 tons of TNT. See YORK, *supra* note 12, at 27. See generally KENZABURO OE, *HIROSHIMA NOTES* (David L. Swain & Toshi Yonezawa trans., 1995) (presenting the thoughts and reflections of eyewitnesses to the Hiroshima explosion); PACIFIC WAR RESEARCH SOCIETY, *THE DAY MAN LOST: HIROSHIMA, 6 AUGUST 1945* (1972) (providing a detailed account of the events leading up to the detonation). On the medical effects of radiation from the bombing of Hiroshima, see WILLIAM J. SCHULL, *SONG AMONG THE RUINS* (1990). For information on the decision to use the atomic bomb on Hiroshima, see J. Samuel Walker, *The Decision to Use the Bomb: A Historiographical Update*, 14 *DIPLOMATIC HIST.* 97 (1990).

19. On the history of the ICJ, see ARTHUR EYFFINGER, *THE INTERNATIONAL COURT OF JUSTICE, 1946-1996* (1996); *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE* (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996); *INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE* (Connie Peck & Roy S. Lee eds., 1997); and *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* (A.S. Muller et al. eds., 1997).

20. See LIFTON & MARKUSEN, *supra* note 15, at 2 ("As we enter the last decade of this century, almost everybody is aware that nuclear weapons pose unprecedented peril."). Lifton and Markusen analogize the growth of nuclear arsenals to the growth of a global genocidal system. The process of building nuclear arsenals is based upon justifications that are not compelling, but if war scenarios are implemented based on these weapon systems, we may reasonably contemplate the end of human life on this planet. Thus, their book is about:

being implemented around the principles and policies of the U.N. Charter, the nuclear age presented a critical and continuing challenge to the inherent or fundamental promise of the Charter itself: that states, large and small, would have their sovereign equality, territorial integrity, and political independence respected and secured by law.<sup>21</sup> At the same time, the principal body charged with securing international security, the Security Council, would have to come to terms with a regime dominated by the threats and counter-threats of a nuclear weapons-dominated arms race.<sup>22</sup>

The key Charter expectations based on security, sovereignty, and self-determined independence soon came under pressure from the establishment of competing zones of security established by the hegemonic distribution of power during the Cold War.<sup>23</sup> In the United States, foreign policy was premised upon the containment of Communism (the Truman/Eisenhower/Kennedy doctrines).<sup>24</sup> Later, the U.S. doctrine of security was dominated by the doctrine of status (*détente*) (the Kissinger-Nixon

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the threat nuclear weapons pose to the human future, about the cast of mind that created and maintains the threat, and about an alternative, hopeful direction. In its exploration of the sequence from a genocidal mentality to a species mentality, the book first confronts the general nature of nuclear entrapment and then seeks insight from a major genocide that has already taken place.

*Id.* at 1.

21. See U.N. CHARTER art. 1.

22. Since the five permanent members of the Security Council have the competence to exercise a veto over matters affecting issues of international peace and security otherwise within the jurisdiction of the Security Council, it is obvious that the Council's role in seeking to control and regulate nuclear weapons threats would be dependent upon forging a consensus among the permanent members of the Council. An important reflection of that emerging consensus is indicated in its statement of January 31, 1992 in which the Council stated, *inter alia*, that "the proliferation of all weapons of mass destruction constitutes a threat to international peace and security." U.N. SCOR, 47th Sess., 3046th mtg., at 145, U.N. Doc. S/PV.3046 (1992). In effect, the Council was asserting its authority under Chapter VII of the U.N. Charter with respect to weapons of mass destruction. See U.N. CHARTER art. 39.

23. See MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 175-88 (1981) (collecting materials on the legal justifications for superpower interventions during the Cold War); see also Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 8-9 (1959) (examining the dynamics of social "areas"); Myres S. McDougal et al., *The World Process of Effective Power: The Global War System*, in *POWER AND POLICY IN QUEST OF LAW* 353 (Myres S. McDougal & W. Michael Reisman eds., 1985) (discussing power in the world order). For an overview of the divergent models seeking to explain the relationship of security doctrines to world order, see Inis L. Claude Jr., *Theoretical Approaches to National Security and World Order*, in *NATIONAL SECURITY LAW*, *supra* note 4, at 31-44. Claude discusses four dominant approaches: balance of power, collective security, world federalism, and functionalist approaches. See *id.* at 33-44. For an integration of the diverse approaches to the problem of security and world order, with a specific emphasis upon the global process of effective power, see Myres S. McDougal, *Law And Power*, 46 AM. J. INT'L L. 102, 102-14 (1952).

24. The Truman Doctrine defined American foreign policy as the containment of the perceived expansionist goals of the Soviet Union. See Harry S. Truman, *The Truman Doctrine*, in 2 *DOCUMENTS OF AMERICAN HISTORY SINCE 1898*, at 525 (Henry Steele Commager & Milton Cantor eds., 1988) (reprinting President Truman's Mar. 12, 1947 message to Congress). This policy of containment continued during the administrations of Presidents Eisenhower and Kennedy. See Dwight D. Eisenhower, *Eisenhower's Security Program-Executive Order 10450*, in 2 *DOCUMENTS OF AMERICAN HISTORY SINCE 1898*, *supra*, at 582 (reprinting Exec. Order 10450, 18 Fed. Reg. 2489 (1953)). For an overview of relevant security doctrines, see Winston P. Nagan, *Economic Sanctions, U.S. Foreign Policy, International Law and The Anti-Apartheid Act of 1986*, 4 FLA. INT'L L.J. 85, 138-53 (1988).



doctrine),<sup>25</sup> and, in more recent times, the “from containment to encroachment” doctrine of the Reagan era.<sup>26</sup> The Soviet Union claimed the right to exercise influence over security zones contiguous to its territory, effectively extending its land border to prevent an invasion from the west.<sup>27</sup> It also claimed, under the Brezhnev Doctrine, the right to defend the gains of international socialism.<sup>28</sup> Despite ideological divisions, both sides found the power necessary to sustain these claims in the nuclear capacities of each bloc. Indeed, the zones in effect established a so-called “nuclear umbrella.” The nuclear weapons-dominated arms race developed dramatically under a regime that sanctioned the production, testing, distribution, and deployment of nuclear weapons.

This Cold War order was often described as a bipolar distribution of power. Such a model was not compatible with the general architecture of a system premised upon the principle of the sovereign equality of states. Some sovereignty and some equality were to be sacrificed at the altar of international security claims by the superpowers that dominated this bipolar structure. The Cold War and the principles of political hegemony that it produced provided a powerful challenge to the U.N. Charter and to the lawyers who sought to sustain its principles. In short, this Cold War order forced the consideration of whether the Charter was undergoing a silent revision and whether these silent revisions of the Charter undermined the very concept of the international rule of law embedded in the Charter.<sup>29</sup>

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25. See Nagan, *supra* note 24, at 140. President Nixon and his national security advisor, Henry Kissinger, developed a new approach to Soviet relations designed to relax the tensions between the superpowers. In 1969, Nixon officially labeled this approach “détente.” See CHARLES W. KEGLEY, JR. & EUGENE R. WITTKOPF, *WORLD POLITICS: TREND AND TRANSFORMATION* 79 (3rd ed. 1989). In order to relax the tensions, Nixon and Kissinger developed a “linkage theory” to develop economic, political, and strategic ties to bind the nations in a common fate. *Id.* The theory was based on the idea that the dependencies that resulted from such linkages would reduce the superpowers’ incentives for war.

26. See Nagan, *supra* note 24, at 145–56.

27. This behavior grew out of the Soviet Union’s World War II experience: the traumatic event of Nazi invasion from the west. See ALEXANDER WERTH, *RUSSIA AT WAR: 1941–45* (describing the invasion).

28. See PETER ZWICK, *SOVIET FOREIGN RELATIONS: PROCESS AND POLICY* 92 (1990).

29. The tension between the technological advances of nuclear weapons and the U.N. Charter is indicated in Dulles’s idea that the Charter was “a pre-atomic age” constitution; it was, he held: obsolete before it actually came into force. As one who was at San Francisco, I can say with confidence that if the delegates there had known that the mysterious and immeasurable power of the atom would be available as a means of mass destruction, the provisions of the Charter dealing with disarmament and the regulation of armaments would have been far more emphatic and realistic.

John Foster Dulles, *The Challenge of Our Time: Peace with Justice*, 38 A.B.A. J. 1063, 1066 (1953). This view lends credence to the view that the atom bombs used on Hiroshima and Nagasaki may simply have been seen as very, very big bombs but, essentially, still conventional bombs. See W. Michael Reisman, *Old Wine in New Bottles*, 13 YALE J. INT’L L. 171 (1988); see also Alvin M. Saperstein, *The “Long Peace”: Result of Bipolar Competitive World?*, 35 J. CONFLICT RESOL. 68 (1991) (modeling the stability and predictability of bipolar and tripolar world orders and applying that analysis to the Cold War system); Raimo Väyrynen, *Bipolarity, Multipolarity, and Domestic Political Systems*, 32 J. PEACE

The important questions on the role of law were as follows:

- (1) the nature of the forces seeking to entrench and expand hegemonic influence under the nuclear umbrella;<sup>30</sup>
- (2) the fundamental principles of international constitutional law governing such matters as self-determination and sovereign equality versus volitional or non-volitional submission to the needs of power in a bipolar world;<sup>31</sup> and
- (3) securing genuine independence and sovereign integrity under the Charter.<sup>32</sup>

A question left unresolved by international lawyers was whether the bipolar world ultimately could be consistent with the letter and the spirit of the U.N. Charter. These questions arose in the ICJ litigation concerning the U.S. intervention in Nicaragua.<sup>33</sup> There, the court rejected "the justification of collective self-defence maintained by the United States of America in connection with . . . militarily and paramilitary activities in and against Nicaragua."<sup>34</sup> Thus, the ICJ essentially sought to limit large states' right to intervene in small states even if justified by Cold War exigencies relating to national security. Here the court's interpretation of the Charter is consistent with the original object and purpose of the instrument. But the losing party in that litigation—the United States—is the power that now constitutes itself as the major power in a unipolar world. That power indicated its displeasure at

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RES. 361 (1995) (discussing the increasing importance of domestic factors with the erosion of bipolarity in international relations); Thomas J. Volgy & Larry W. Imwalle, *Hegemonic and Bipolar Perspectives on the New World Order*, 39 AM. J. POL. SCI. 819 (1995) (providing an analysis of the "new world order" after the Cold War and the bipolar balance of power structure).

30. The simplicity of this question belies the complexity it provokes for understanding world order during the Cold War period. The central national security doctrines of the major powers, such as the Nixon Doctrine and the Brezhnev Doctrine, reflected a complex assessment of whether the superpowers were using the nuclear umbrella for imperialism or for security. Further complications involved the emergence of a group of so-called "non-aligned states" and of movements of national liberation. For an overview of these complexities, see W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1 (1973). Reisman's principal thesis is that the global war system comprises many more actors than simply nation states, and that realism demands that these actors be accounted for if world order is to respond realistically to the problems of violence in the world order. See also McDougal et al., *supra* note 23; Myres S. McDougal et al., *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988) (arguing that a more realistic conception of world order must include a more complete map of the entire planetary social process from which the problems involving violence often emerge).

31. An effort to understand the emerging constitutional law system as a process influenced by the complexities of global power and social processes is found in Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 91 J. LEGAL EDUC. 253 (1969).

32. A major purpose of the U.N. Charter is expressed in Article 2(4): "All members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4; see also *id.* art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its members.").

33. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 1 (June 27).

34. *Id.* at 146.

the *Nicaragua* ruling and has not honored its terms.<sup>35</sup> Additionally, the United States has also declined to continue its consent to the compulsory jurisdiction of the court.

The court may have had a sixth sense in the *Nicaragua* case about projected historical trends. The changes in world order since 1989 have been of millennial importance. The disintegration of the Soviet Union and Yugoslavia into clusters of new states, the fall of apartheid in South Africa, the fall of Mobutu's Zaire,<sup>36</sup> and the re-emergence of civilian democratic rule in Nigeria<sup>37</sup> have generated a renewed interest in the Charter's original object and purpose as the organizing instrument of constitutionality-directed world order principles.<sup>38</sup> The ICJ's role reaffirms a durable constitutional architecture for international order as we approach the twenty-first century. However, we must not forget the limitations that the Cold War placed upon the role and relevance of such international constitutional perspectives against the actual operations of international power politics. In short, the conflict between law (the domain of the lawyer) and power (the domain of the national security specialist) was an acute one and a basic test of the rule-of-law foundations of international order.

Indeed, in this post-Cold War period, we are still confronted with the problem of nuclear weapons and the residue of expectations, claims, and deployments that have survived the Cold War. How far and to what extent are the production and distribution of nuclear weapons capabilities regulated by general international law? How far and to what degree has treaty law influenced the evolution of international law standards of general prescriptive force in the control and regulation of nuclear weapons? What precisely are the roles of the international lawyer and the ICJ in this process as we approach the twenty-first century?

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35. See *U.S. Vetoes U.N. Slap at Contra Aid*, CHI. TRIB., Oct. 29, 1986, at 2C; *United Nations: Assembly Urges U.S. Compliance with World Court*, Inter Press Serv., Nov. 3, 1986.

36. For an account of Mobutu's fall, see Bob Drogin & Mary Williams Nash, *President of Zaire Flees Capital*, L.A. TIMES, May 18, 1997, at A1.

37. See Anton La Guardia, *International: Ex-General Declared President in Nigeria*, DAILY TELEGRAPH (London), Mar. 2, 1999, at 13.

38. See generally HUMAN RIGHTS AND GOVERNANCE IN AFRICA (Ronald Cohen et al. eds., 1993) (suggesting that new thinking is required to reshape the process of African governance and African public order). The interdependence of political and constitutional development and economic development for the further enhancement of sustainable public order in Africa is indicated in *Emerging Africa*, THE ECONOMIST, June 14, 1997, at 13 (emphasizing the importance of economic development in Africa).

### III. THE EVOLUTION OF LAW AND PRACTICE RELATING TO NUCLEAR ARSENALS

#### A. *The Use of Nuclear Weapons*

In 1995, the fiftieth anniversary of the dropping of the atom bombs on Hiroshima and Nagasaki, there was a multi-forum debate in the United States about the history and morality of the use of the atom bomb.<sup>39</sup> The question at the heart of this national debate was whether the United States was wrong to use the bomb on a human population.<sup>40</sup> The debate in the United States represented painful soul searching. The dominant view, which had been put forward in the early postwar years, appeared to be that the bomb's use was justified on the basis of projected casualties (both American and Japanese).<sup>41</sup> An added assumption was that a continuation of the saturation bombing would have exacted more Japanese casualties than the use of the atom bomb on two Japanese cities.<sup>42</sup>

More skeptical views seemed to suggest that neither President Truman nor his key advisors would have had time to actually understand and digest the true nature of the bomb they were about to use.<sup>43</sup> Even those who tested it

39. See, e.g., Henry Allen, *The Gate of Hell; In Nagasaki in 1945, a Japanese Photographer Recorded a Nightmare World*, WASH. POST, Oct. 21, 1995, at H1; Mary Ficklen, *Earning a Voice in Bomb Debate*, DALLAS MORNING NEWS, Aug. 28, 1995, at 12C; see also Morton Keller, *Amnesia Day*, NEW REPUBLIC, Sept. 18-25, 1995, at 14-15. ("Remembrance of the Pacific war has been more complicated. Liberal guilt over the bomb and more general regret at the internment of Japanese-Americans has marred, for some, America's victory.")

40. It was a subtext of this debate that if the United States acknowledged that it was wrong, the obvious implication would be that a national apology, however oblique and indirect, would be in order. In a speech given in Hiroshima in August 1994, the author publicly called for an apology. See *supra* note 3.

41. See HENRY L. STIMSON & MCGEORGE BUNDY, *ON ACTIVE SERVICE IN PEACE AND WAR* 631-33 (1948).

42. Professor Edward Teller, the father of the hydrogen bomb, suggested in a speech that perhaps the bomb might have been used with less lethal effects in the way of human casualties. For example, detonation perhaps over Tokyo Bay and at a higher altitude might have made the political point with more humane effects. My colleague, Professor Alex Greene (Department of Engineering, University of Florida), in correspondence with Teller, indicated that detonation from a higher altitude would have most certainly destroyed the aircraft carrying the bomb. Letter from Alex E. J. Greene, Clean Combustion Technology Laboratory, University of Florida, Director Emeritus, Livermore National Laboratory, Stanford University, to Edward Teller (Sep. 9, 1995) (on file with the author).

In general, the outcome of this national debate seemed to support the view indicated by Admiral Nimitz, namely that the bomb's use reduced total casualties and possibly even Japanese casualties. See Henry L. Stimson, *The Decision to Use the Atomic Bomb*, HARPER'S MAG., Feb. 1947, at 97.

According to Admiral Nimitz's biographer:

Nimitz considered the atomic bomb somehow indecent, certainly not a legitimate form of warfare. He hoped the Americans would not have to use it. He discussed the situation with Captain Edwin Layton, who had devoted much of his adult life to the study of Japanese psychology. Layton thought the dropping of the atomic bomb was a virtual necessity. He pointed out, as he had often done before, that only the Emperor had the prestige to make the Japanese stop fighting, and even for him it would be no easy thing.

E.B. POTTER, *NIMITZ* 386 (1976). Layton also suggested that even if the Emperor ordered the Japanese to stop, "the result might not be decisive unless he could prove to his people that the alternative was indeed the destruction of Japan. The atomic bomb might provide that proof. Nimitz had come to the same conclusion, but he wanted to hear it from his Japanese expert." *Id.*

43. See generally LAWRENCE S. WITTNER, *ONE WORLD OR NONE: A HISTORY OF THE WORLD*

could not have fully appreciated what it would mean in actual use on a living city. Other skeptical views held that the bomb's use essentially demonstrated American power and signaled that Soviet expansion must cease. In short, the bomb was the first offensive that launched the Cold War. The above-mentioned issues are missing an element. That element is what international lawyers, even in hindsight, can say about the use of the atom bomb in Japan.<sup>44</sup> The search for a justification by military leaders, moralists,<sup>45</sup> and scientists<sup>46</sup> demonstrates the importance of other disciplines to this important question. That is to say, the conversation about nuclear weapons should not be left purely to the security establishment or the political establishment without the benefit of other perspectives, including the legal perspective. In fact, the ICJ's recent decision makes a vital contribution to deepening our understanding of the normative priorities of, the strategic objectives of, and the way in which effective decision-makers should rationally think about the nuclear weapons problem. With this aside, we may tentatively ask the question about how we can characterize the legality of the American use of the atom bomb in Japan.<sup>47</sup>

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NUCLEAR DISARMAMENT MOVEMENT THROUGH 1953, at 33–35 (1993) (indicating that the weapon was sufficiently new that its full implications could not be fully appreciated); Jordan J. Paust, *The Nuclear Decision in World War II—Truman's Ending and Avoidance of War*, 8 INT'L LAW. 160 (1974) (providing an analysis of the decision to drop the bomb). This may be compared to President Truman's justification for the use of the bomb. See Harry S. Truman, Radio Report to the American People on the Potsdam Conference (Aug. 9, 1945), in 1945 PUBLIC PAPERS 202 (1961). According to Truman:

Having found the bomb we have used it. We have used it against those who attacked us without warning at Pearl Harbor, against those who have starved and beaten and executed American prisoners of war, against those who have abandoned all pretense of obeying the international laws of warfare. We have used it in order to shorten the agony of war, in order to save the lives of thousands and thousands of young Americans.

*Id.* at 212.

44. For instance, Richard Falk states:

The use of atomic bombs against Hiroshima and Nagasaki was never evaluated in relation to this international law framework by planners and leaders, nor has the subsequent diplomacy of the nuclear age, which has included some twenty documented threats to use nuclear weapons, been in any way sensitive to such legal criteria. In the voluminous literature devoted to the Cuban missile crisis, only international lawyers have regarded the international law dimension of the crisis as important, except as it was considered in the detailed planning that was associated with the actual carrying out of the strategic decision.

RICHARD FALK, REVITALIZING INTERNATIONAL LAW 112 (1989).

45. See NUCLEAR WEAPONS AND CHRISTIAN CONSCIENCE (W. Stein ed., 1961); see generally POLITICAL REALISM, *supra* note 11.

46. See ATOMIC BOMB SCIENTISTS: MEMOIRS, 1939–1945 (Joseph J. Ermenc ed., 1989) (detailing the role of scientists in the development of the atomic bomb). Joseph Rotblat is a physicist who worked on developing the American atom bomb during and after World War II; he has become one of the most outspoken critics of the development of nuclear technology and the philosophy of nuclear deterrence. For example, Rotblat has criticized the underestimation of the risks of nuclear radiation. In 1981, he “embarrass[ed] the Government by saying its nuclear survival plans gave ‘a false sense of security.’” Maurice Weaver, *The Prize Man from Pugwash*, DAILY TELEGRAPH (London), Oct. 14, 1995, at 19.

47. The *Shimoda* case, a Japanese case, touches upon some aspects of such legality. See *Shimoda v. State*, 355 HANREI JIHŌ [DECISIONS BULLETIN] 17, reprinted and translated in 8 JAP. ANN. INT'L L. 212, 212–52 (1964); see also RICHARD A. FALK, LEGAL ORDER IN A VIOLENT WORLD 374–413

No definitive answers are possible in the positivist sense, but such an exercise helps frame the legal discussion of the problem.

The first question that we confront is whether the bomb's use can be justified by the principles of military necessity and the principles of proportionality relating to the law of armed conflict.<sup>48</sup> A colorable case can be made that the principles of military necessity do not serve as a justification for the use of the bomb. On the other hand, given that the extent of the destruction could not be foreseen, the principle of proportionality may weaken the argument from necessity.<sup>49</sup>

The question of whether humanitarian principles should have constrained the bomb's use is very compelling when we recognize that this weapon does not distinguish between combatants and noncombatants. Additionally, the objectives of the bombing, even in proximity to a military target, show virtually no regard for the effects on civilians<sup>50</sup> and may have even contemplated the shock value of the bomb as a stratagem to secure unconditional capitulation. No hard and fast legal conclusions exist here. These principles merely contemplate the use of legal tools that preexist the bomb and work on the assumption that the decision-makers of the time must have viewed the bomb not as *sui generis*, but rather as just a very, very big bomb.

Another factor may be the "total war" ideas that influenced some German and Japanese decision-makers. Allied reprisals (saturation bombing of industrial targets) may have been seen as a justifiable response to the total war concept, although this is an open, uneasy question.<sup>51</sup> Both human rights and environmental law concerns remained undeveloped in international law until after the Second World War.<sup>52</sup> While it may be said with the benefit of hindsight that the bomb's use on a civilian population was morally wrong, the legality of its use in 1945 may be more problematic. Furthermore, the issue of

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(1968).

48. See *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 AM. SOC'Y INT'L L. PROC. 39 (1992) (discussing alternative conceptions of proportionality and necessity).

49. But cf. WITTNER, *supra* note 43, at 28 ("Ironically, however, the military value of using the bomb had dwindled considerably by mid-1945 and, for this reason, a small number of middle-echelon U.S. government officials did question U.S. policy.").

50. See FALK, *supra* note 44, at 112 ("['M]ilitary target' is given such a loose definition that it includes everything pertaining to a war effort, even civilian morale . . .").

51. For a discussion on saturation bombing of industrial targets during World War II, see Tami D. Biddle, *Air Power*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD*, *supra* note 4, at 140, 151-54.

52. Many of the human rights and environmental law concerns were not addressed by international law until after World War II. See, e.g., Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970); International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); Declaration of the United Nations Conference on the Human Environment, (adopted June 16, 1972, by the U.N. Conference on the Human Environment at Stockholm), U.N. Doc. A/CONF.48/14/Rev. 1 (1973), U.N. Doc. A/CONF. 48/14 at 2-65, and Corr. 1 (1972), *reprinted in* 11 I.L.M. 1416 (1972).

whether the United States retrospectively violated international law in 1945 remains debatable. To some, it obviously has; to others, this is a matter of vigorous dispute. That this issue still tests the moral sensibility of all Americans is unquestioned.

B. *The Testing of Nuclear Weapons: The Testing-Ground of Legality in International Law*

The United States set the pace in the nuclear arms race with the development of the hydrogen bomb.<sup>53</sup> It may be parenthetically noted that many nuclear powers do not wish to test weapons systems on the home front.<sup>54</sup> They are apparently concerned that tests would unnecessarily provoke public disapproval.<sup>55</sup> As such, the U.S. security establishment decided that the hydrogen bomb would be tested on a number of islands in the South Pacific, far from the U.S. mainland. The United States had acquired a trust responsibility over these islands from the United Nations, and in exercise of trust sovereignty, decided that it was appropriate to test those weapons there.<sup>56</sup> The islands' civilian populations were small; the islands were far from any population centers; and the projected impacts on the surrounding oceans were deemed to be reasonable because ocean spaces for public safety were secured by a process of warnings and explicitly defined safety zones.<sup>57</sup> The test explosion of March 1954 was grossly underestimated by U.S. scientists by some fifty percent.<sup>58</sup> American and Japanese sailors were injured; in the case of the Japanese, the sailors aboard the vessel *Fukuryu Maru* were sailing clear of the safety zone.<sup>59</sup>

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53. See FALK, *supra* note 44, at 100 ("In essence, ever since the use of the atomic bomb at the end of World War II, the U.S. government has insisted on retaining the nuclear option as an instrument of state craft, especially in superpower relations.").

54. See Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 252 (Dec. 20).

55. See WITTNER, *supra* note 43, at 340 (discussing the growth of movements supporting nuclear disarmament); Coalition to Reduce Nuclear Dangers, *Comprehensive Test Ban Treaty Site* (visited Apr. 7, 1999) <<http://www.clw.org/coalition/ctsupportor.htm>>; Coalition to Reduce Nuclear Dangers, *Eight in Ten Voters Support Senate Approval of Nuclear Test Ban Treaty* (July 29, 1998) (visited Apr. 7, 1999) <<http://www.clw.org/coalition/comborel.htm>>; The Henry L. Stimson Center, *Public Attitudes on Nuclear Weapons: An Opportunity for Leadership* (visited April 7, 1999) <<http://www.stimson.org/policy/pollmemo.htm>>.

56. See Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 648-49 (1955). According to McDougal and Schlei, "the U.N. Security Council was advised by the United States that the atoll and its territorial waters had been closed for security reasons, in accordance with Article 13 of the Trusteeship Agreement, in order to enable the AEC to conduct atomic tests." *Id.* at 651.

57. See *id.*

58. See *id.* at 652.

59. The U.S. trust was made up of 98 island groups comprised of approximately 2000 islands. The area of land was about 846 square miles spread over some 300,000 square miles of ocean. The United States entered into an agreement with the United Nations to administer this trust territory as a strategic trusteeship arrangement on July 18, 1947. See Trusteeship Agreement for the Former Japanese Mandated Islands, Apr. 2, 1947, 61 Stat. 3301, 8 U.N.T.S. 189 (entered into force July 18, 1947). In terms of the trust arrangement, the United States informed the Security Council that the Bikini Atoll and

Injury to Japanese civilians lawfully using the high seas and the displacement of island inhabitants precipitated specific claims under international law that permitted a larger discourse about the role of international lawyers and the problems of nuclear weapons. Specifically, the legal issues in this case raised one phase of the nuclear problem: the testing of nuclear weapons.<sup>60</sup>

These issues were debated in diplomatic fora, at the United Nations, and in reputable journals devoted to legal scholarship. In other words, decision-making interventions such as adjudication, arbitration, and mediation or other appropriate techniques for characterizing and deciding on the lawfulness of the testing process were not central to this issue at this time. It was in the arena of scholarly inquiry that a fuller appreciation of the nuclear issue as a legal problem occurred and evaluations of the potential for a mature juridical response to it ultimately emerged. For example, the Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons was adopted by the General Assembly on November 24, 1961.<sup>61</sup> The Declaration itself does not refer to scholarly works, but it recalls those international instruments which sought to prohibit weapons of mass destruction because they cause "unnecessary human suffering" and were thus prohibited because they are "contrary to the laws of humanity and to the principles to international law."<sup>62</sup>

The Declaration then, under the considering paragraph, states that "the use of nuclear and thermo-nuclear weapons would bring about indiscriminate suffering and destruction to mankind and civilization to an even greater extent than the use of those weapons declared by the aforementioned international declarations and agreements to be contrary to the laws of humanity and a crime under international law."<sup>63</sup> It may thus be confidently asserted that the scholarly discourse had drawn the attention of both political elites and international opinion makers, so that the General Assembly declaration itself is put in terms of the problems that nuclear weapons pose for international law. Functionally, these insights included a discourse about the "policy content" of inherited prescriptions, the problem of the control "intention" of all relevant power-conditioned parties, and the nature and quality of the

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surrounding seas had been closed for security reasons. The United States also advised shipping to avoid an area of some 180,000 square miles. When the tests were projected for the area of Eniwetok, an area of 30,000 square miles was indicated as the warning zone. See McDougal & Schlei, *supra* note 56, at 651. These zones were ultimately expanded to include an area of 400,000 square miles by 1954. See Emanuel Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. 629, 632 (1955); McDougal & Schlei, *supra* note 56, at 651 ("In March 1954, when it had become apparent that the warning area then in effect was inadequate, it was extended to include a total area of approximately 400,000 square miles.").

60. See W. Michael Reisman, *International Lawmaking: A Process of Communication*, Address Before the American Society of International Law (Apr. 24, 1981), in AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 75TH ANNIVERSARY CONVOCATION 101, 114 (1983).

61. Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons Adopted by the U.N. General Assembly, G.A. Res. 1653, U.N. GAOR, 16th Sess., Supp. No. 17, at 4, U.N. Doc. A/5100 (1962), reprinted in 2 INTERNATIONAL LAW AND WORLD ORDER: BASIC DOCUMENTS, at I.L.C.12a (Burns H. Weston ed., 1995).

62. *Id.* at I.L.C.12a, 1.

63. *Id.*



complex "authority" signals about the necessity or the threats posed by nuclear arsenals.<sup>64</sup> In effect, the nuclear arsenals issue presented an almost ideal model for assaying the challenges inherent in the operational processes of international lawmaking.

Scholars questioned the lawfulness of the U.S. testing program in the South Pacific on the basis that it contravened certain provisions of the U.N. Charter,<sup>65</sup> that it was inconsistent with the customary law of the sea,<sup>66</sup> and that it was a violation of the Trusteeship Agreement.<sup>67</sup> On the other hand, McDougal and Schlei argued that the policy consequence of a legal constraint on testing would amount to "unilateral disarmament" and an "attendant invitation to destruction."<sup>68</sup> They, therefore, called for a more careful examination of the legal bases for the testing. They argued that the principal objections to the testing did not adequately account for the law of self-defense. They further argued that a careful, contextual appraisal of the conditions of world order—subject to the standard of reasonable interpretation of a number of intersecting legal prescriptions—suggested the lawfulness of testing under international law. In short, they argued that the "full utilization" gloss implicit in the freedom of the seas permitted a reasonable use of the seas, and that promoting the security of the free world was just such a reasonable use. They added that the dislocation of the indigenous inhabitants was only a trivial issue when judged against the crisis of world order. Therefore, the dislocation was a reasonable exercise of competence allocated in Article 73 of the U.N. Charter,<sup>69</sup> as well as Article 6 of the Trusteeship

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64. See Reisman, *supra* note 60, at 113. The model is drawn from the notion that international law, in order to count as law, must have a prescriptive policy content; must be accompanied by signs and symbols indicating a widespread community acceptance in the sense that community is the basis for authority in international law; and must be accompanied by some conception of efficacy, that is, accompanied by some capacity of control to ensure that the prescribed law is real, and not simulated. *See id.*

65. See U.N. CHARTER art. 1, para. 1; *id.* art. 1, para. 2; *id.* art. 2, para. 3; *id.* art. 2, para. 4. The allegations challenging the U.S. testing program under the Charter essentially claimed that the testing program was not calculated to enhance peace and security, under Article 1(1), nor to prevent or remove threats to peace or suppress acts of aggression, etc. The allegations with respect to Article 1(2) claimed essentially that the testing program was not designed to enhance "friendly relations" among nations nor did it respect the equal rights and self-determination of the populated groups effected. The alleged violation of Article 2(3) suggested that the United States, by testing these nuclear weapons, was settling its international disputes in a way that endangered international peace and security. With respect to the alleged violation of Article 2(4), the claim represented a charge of attenuated aggression.

66. See Margolis, *supra* note 59, at 630–36. For a modern codification of the law of the sea, see U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982); *see also id.* art. 23 (requiring ships carrying nuclear materials to observe "special precautionary measures"); *id.* art. 141 (declaring that international waters are to be used "exclusively for peaceful purposes"); *id.* art. 146 (declaring that "necessary measures shall be taken to ensure effective protection of human life" in international waters).

67. See Reisman, *supra* note 60, at 114; *see also* McDougal & Schlei, *supra* note 56, at 654.

68. McDougal & Schlei, *supra* note 56, at 709.

69. U.N. CHARTER art. 73 (recognizing obligations of states administering non-self-governing territories).

Agreement (under which the United States undertook to secure the well-being of the inhabitants in the trust area).<sup>70</sup>

In the context of the temporary appropriation of vast tracts of ocean, McDougal and Schlei argued that the evolution of rules governing the sea had to accommodate the enormous corpus of ambiguous, contradictory, and incomplete claims in a world lacking central decision-making structures of authority and control. In this decentralized arena, decisions concerning the legal regulation of the oceans were subject to the principle of state actors being both claimants and decision-makers, the *dedoublement fonctionnel*.<sup>71</sup> Thus, the resolution and/or acceptance of such claims at law had to be subject to reasonable interpretation, as it might appear to a disengaged third-party appraiser. McDougal and Schlei quoted Professor H.A. Smith to support the theory of interpretation that their view promotes:

The law of nations which is neither enacted nor interpreted by any visible authority universally recognized, professes to be the application of reason to international conduct. From this it follows that any claim [to assert power outside the three mile limit] which is admittedly reasonable may fairly be presumed to be in accord with law, and the burden of proving that it is contrary to the law should lie in the state which opposes the claim.<sup>72</sup>

The gloss that McDougal and Schlei gave to Smith's view is that the general "world order context of the Cold War" and the specific facts are the only means by which the standard of reasonableness can be rationally applied to the question of the lawfulness of testing thermonuclear weapons in the trust areas of the South Pacific. The problem with the McDougal-Schlei analysis is that when one juxtaposes the rules relating to the interpretation of the trusteeship agreement and the law of the sea against a claim to survival based on Article 51 of the U.N. Charter,<sup>73</sup> it would always appear to be "reasonable" to secure the survival of the world by testing these weapons despite such inconveniences. It should be noted, however, that their analysis downplays the damage to the environment that ultimately occurred. The islands continue to be contaminated by radiation, and the original inhabitants are unable to return.

The central issue is not whether these after-the-fact appraisals are right or wrong. What is important is that the question of nuclear weapons, even if only in the limited context of atmospheric testing, had become a central part of international legal discourse, and, as such, had an important influence on practical decision-makers and evolving international legal standards. An illustration of law gravitating from the scholarly journals to law as an

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6. 70. See Trusteeship Agreement for the Former Japanese Mandated Islands, *supra* note 59, art. 6.

71. The principle of the *dedoublement fonctionnel*, or duality of function, recognizes that the domestic decision-maker, in certain contexts, is also an international decision-maker. Hence, the decision-maker may perform a double lawmaking function. The decision-maker participates from the domestic point of view as a claimant and at the same time seeks to justify those claims on the basis of criteria that would be acceptable to a hypothetical third-party international appraiser. For more on this principle, see MCDUGAL & REISMAN, *supra* note 23, at 13.

72. McDougal & Schlei, *supra* note 56, at 660 (quoting H.A. SMITH, THE LAW AND CUSTOM OF THE SEA 20 (1950)).

73. See U.N. CHARTER art. 51 (guaranteeing the right to self-defense).

expression of positive commitment emerged in the context of the 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water.<sup>74</sup> It is of course impossible to trace exactly the way in which opinion leaders and international elites began to specifically conceptualize the nuclear threat from the point of view of international law and world order. Certainly many voices have participated in the crystallization of internationally sanctioned norms and standards relating to the control and regulation of nuclear weapons.

However, the efforts of scholars in their important discourse to appreciate the factual conditions and consequences for world order posed by nuclear weapons systems and their deployment, as well as the effort to provide a juridical framework within which the discourse might occur, must be presumed to have influenced the emerging regimes relating to the legal control of nuclear weapons. The 1963 treaty was entered into by the United States, the Soviet Union, and the United Kingdom, the "original parties."<sup>75</sup> The treaty's major purpose was rooted in the broader process of attaining an agreement on "general and complete disarmament."<sup>76</sup> It was part of the context of an objective to "achieve the discontinuance of all test explosions of nuclear weapons for all time,"<sup>77</sup> and its purpose was also tied to the objective of putting an end to the contamination of man's environment by radioactive substances.<sup>78</sup>

The other U.N. organs followed this cue and began to focus more seriously on the larger problem posed by the production, deployment, and even possible use of nuclear weapons. A good illustration is the General Assembly resolution on the "urgent need for Suspension of Nuclear and Thermonuclear Weapons."<sup>79</sup> The change of attitude and the United Nations's seizure of the issue led to the promulgation of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).<sup>80</sup> The treaty's central point was obvious. Proliferation increased the possibility of nuclear war, and that possibility—and the devastation that would ensue—was unacceptable. While the Test Ban Treaty was an agreement between members of the "nuclear club," this NPT represented the sentiments of the non-nuclear powers as well. Under this treaty, the non-nuclear powers, not being members of the "club," would forego the opportunity to project either national power or prestige with their own "bomb."

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74. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, *supra* note 14.

75. *Id.* pmbl.

76. *Id.*

77. *Id.*

78. *See id.*

79. G.A. Res. 2032(XX), U.N. GAOR, 20th Sess., Annexes (XX), Agenda Item 30, at 2, U.N. Doc. A/6124 (1965).

80. *See* Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 52.

Among the major powers left out of the "club" was France. France began testing weapons devices and, like the United States, it chose to do so far from home. In fact, France's testing program was out in the South Pacific in the Mururoa Atoll 6000 kilometers east of Australia. Australia instituted proceedings against France in the ICJ.<sup>81</sup> Australia requested that France discontinue testing pending a judgment (of jurisdiction and the merits) by the court.<sup>82</sup> Although France did not argue in the interim measures phase of the case, it sent a letter indicating that the testing issue was a matter of national security and that the court was not competent to accept jurisdiction in this case. The court ruled that it could not be presumed "a priori that all [of Australia's] claims fall completely outside the Court's jurisdiction or that Australia could not establish a legal interest regarding its claims."<sup>83</sup> In retrospect, as we shall see, the decision to provide interim measures was a brave one.

During the interim period prior to the hearing on jurisdiction and the merits, it was generally thought that the key players in the nuclear club would have made their voices heard on this issue by supporting the Australian claim. However, whatever noises were heard were tantamount to the sound of one hand clapping. In its second opinion, the court declined to answer the question that was the case's object and purpose; instead, the existence of a dispute no longer existed because France had declared that its nuclear testing program in the South Pacific was at an end. The court thus concluded that "no further pronouncement [was] required in the . . . case," stressing that it "does not enter into the adjudicatory functions of the Court to deal with issues in abstract."<sup>84</sup>

Australia, in fact, wanted more than a cessation of French testing. It claimed for itself and all other states a right to be free from atmospheric nuclear tests.<sup>85</sup> Still, the question remains why the court seemed to retreat from the promise suggested in the interim measures phase of the proceedings.

Other would-be club members also began testing nuclear weapons, the most notable of which was the People's Republic of China. It is, of course, unclear exactly how many additional states can currently have a testing capability within a short time if they so desire.<sup>86</sup> Such possibilities underscore

81. See *Nuclear Tests Case (Austl. v. Fr.)*, 1973 I.C.J. 98, 99 (June 22).

82. See *id.* at 100.

83. *Id.* at 103.

84. *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253, 287 (Dec. 20).

85. See *Nuclear Tests Case*, 1973 I.C.J. at 103. For a discussion of recent developments on this issue, see Bernard Edinger, *Australia, France Bury Nuclear Test Hatchet*, Reuters World Serv., Dec. 16, 1996, available in LEXIS, News Library, Wire Service Stories File, which noted that "After a huge international campaign spearheaded by Australia and New Zealand, the tests were concluded ahead of schedule in January. France has since committed itself to a global test ban." *Id.*; see also Ignace Dalle, *French Nuclear Body Will Leave Mururoa by End of Year*, Agence Fr.-Presse, Dec. 17, 1996, available in LEXIS, News Library, Wire Service Stories File (noting that Mururoa, "the site 18,000 kilometers (12,500 miles) from Paris and 6,600 kilometers away from Los Angeles and Sydney, where France conducted most of its nuclear tests, is slowly returning to its natural state").

86. Take, for instance, the case of South Africa, which was suspected to have nuclear capability. In the late 1970s, a massive geophysical event occurred in the South Atlantic that some believed was a nuclear test. See *Inside South Africa's Atomic Laager*, FIN. TIMES (London), May 20,

a critical threat to international order and security: the proliferation of nuclear arsenals. This leads us into another important development among non-nuclear powers.

### C. *Small Powers React: Nuclear Weapon-Free Zones*

Regional nuclear-free zones have reflected one of the most important developments in defining the expectations of non-nuclear powers, namely, the forging of regional understandings. These agreements ensure that large areas of the planet will be entirely free of nuclear weapons. Illustrations of these agreements include the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco),<sup>87</sup> the Southeast Asia Nuclear Free Zone Treaty,<sup>88</sup> South Pacific Nuclear Free Zone Treaty,<sup>89</sup> and the African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba).<sup>90</sup> The proliferation of nuclear-free zones, in some degree, is consistent with the policies in general of nonproliferation. On the other hand, because they express policies that fundamentally seek the complete eradication of nuclear weapons, these treaties express an expectation that extends beyond the expectations of the immediate parties to these instruments. For example, language in Article 1(2) of the Treaty of Tlatelolco states, "The Contracting Parties also undertake to refrain from engaging in, encouraging or authorizing, directly or indirectly, or

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1993, at 6; see also David Albright, *South Africa and the Affordable Bomb*, 50 BULL. ATOMIC SCIENTISTS 37, 42 (1994); Murrey Marder & Don Oberdorfer, *How West, Soviets Acted to Defuse S. African A-Test*, WASH. POST, Aug. 28, 1977, at A1 (quoting a U.S. official, who said, "I'd say we were 99% certain that the construction was preparation for an atomic test").

There is considerable circumstantial evidence that South Africa is indeed a nuclear power. See Jack Anderson, *The Mystery Flash: Bomb or Phenomenon*, WASH. POST, Sept. 16, 1980, at A25; Jack Anderson, *South Africa's Secret Uranium Process*, WASH. POST, Sept. 15, 1980, at B15; see also Caryle Murphy, *Embargo Slows South African A-Plans*, WASH. POST, Sept. 12, 1980, at A24 (describing South Africa's refusal to sign the Nuclear Non-Proliferation Treaty). South Africa's "hint" that it was willing to sign the nonproliferation pact is viewed as an important signal that it has a nuclear weapons capability. See Ned Temko, *S. Africa Signal on Nuclear Pact Suggests It Has Bomb*, CHRISTIAN SCI. MON., Sept. 29, 1987, at 9. See generally Albright, *supra*, (describing development of South Africa's nuclear weapons program). F.W. de Klerk made an announcement in March 1993 that South Africa had built a small, secret nuclear arsenal—and then eliminated it. South Africa had kept its weapons production infrastructure extremely secret. Later, a convicted Soviet spy, Commodore Dieter Gerhardt, revealed that the 1979 flash was caused by an Israeli-South African test. See *id.* at 42. Since the demise of apartheid, South Africa has been explicit in its support of a nuclear weapons-free Africa and a regime of nonproliferation. See Albright, *supra*, at 37 (describing South Africa's accession to the nonproliferation regime).

87. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 281.

88. Treaty on Southeast Asia Nuclear Weapon-Free Zone, Dec. 15, 1995, 35 I.L.M. 635 (1995).

89. South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, U.N. Doc. CD/633 (1985), 24 I.L.M. 1442 (1985) (entered into force Dec. 11, 1986).

90. Final Text of a Treaty on an African Nuclear-Weapon-Free Zone (Pelindaba Text), Sept. 13, 1995, U.N. GAOR, G.A. Res. 426, 50th Sess., Annex, U.N. Doc A/50/426.

in any way participating in the testing, use, manufacture, production, possession or control of any nuclear weapon."<sup>91</sup>

There are three general facts about the nuclear weapon-free zone regimes. First, in the aggregate, they represent a vast expanse of the human population and the globe, expressing a specific desire for the eradication of nuclear weapons. Second, these regimes indicate a very clear policy content for the eradication of nuclear weapons; they carry a strong authority signal in the sense that they are mandated by both their states and by the societies that they represent. Third and most important, they carry an important element of international lawmaking: a strong, controlled intention that carries a clear principle, even if that principle is not yet universally established. In this sense, the nuclear weapon-free zone regimes, as a whole, are powerful prescriptive forces for moving in the direction of a categorical outlawing of nuclear weapons.

There is one further point that may be made about the juridical implications of the nuclear weapon-free zone regimes. Commentators, as well as the International Court of Justice, have made reference to the notion that the law with respect to nuclear weapons is essentially a form of *lex specialis*.<sup>92</sup> It is possible to see that the concept of *lex specialis* reinforces the position of certain commentators that the regime of nuclear weapons, as such, is a *sui generis* regime. I suggest that a more careful appraisal of the nuclear weapon-free zone regimes suggests, not so much an aspiration to a distinct regime, the *lex specialis*, but, on the contrary, to the regimes' aspiration towards a gradual policy of eradication. It is obvious that these regimes are not tied to any specific component of nuclear weapons policy, but, in fact, the multiple free zone regimes speak in broad, comprehensive terms. This seems to undermine the expectation, in general, that the nuclear regime is an essentially treaty-dominated form of *lex specialis* or that it is totally *sui generis*. The nature of free zone regimes is geographically delimited, but is comprehensive in seeking to prevent all nuclear weapons activity within the declared zones.

It may be useful in this regard to more carefully outline the African nuclear weapon-free regime because, in many ways, Africa represents the smaller states of the world that do not wish to have their security compromised by the threat and/or use of nuclear weapons. Moreover, the only African country that has had nuclear weapons, South Africa, has itself made the decision *not* to be a nuclear power.<sup>93</sup> Let us, therefore, outline the key characteristics of the African regime and their larger implications.

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91. Treaty for the Prohibition of Nuclear Weapons in Latin America, *supra* note 87, art. 1, para. 2.

92. See, e.g., W. Michael Reisman, *The Political Consequences of the General Assembly Advisory Opinion*, in INTERNATIONAL LAW, THE WORLD COURT, AND NUCLEAR WEAPONS 471, 483 (Laurence Bosson de Chazournes & Philippe Sands eds., forthcoming 1999) (describing the legal status of nuclear weapons as *sui generis*).

93. See Albright, *supra* note 86, at 37 (describing South Africa's accession to the nonproliferation regime).

The Organization for African Unity (OAU) has long recognized the need for a treaty that would keep Africa out of the nuclear weapons arms race.<sup>94</sup> On April 11, 1996, the African Nuclear-Weapon-Free Zone Treaty (the Treaty of Pelindaba) was opened for signature.<sup>95</sup> Egypt, which had been a leader in calling for the renunciation of nuclear military choice, signed the treaty on the first day of its initiation.<sup>96</sup> The treaty, in general, carries within it the principles of nonproliferation as well as major power guarantees.<sup>97</sup> In fact, major powers, such as the United States, a charter member of the nuclear club, supported in principle the denuclearization of Africa as far back as 1965.<sup>98</sup> The United States admits to playing an active role in the final draft of the treaty, including relevant protocols.<sup>99</sup>

The treaty prohibits any research, development, manufacture, stockpiling, acquisition, testing, possession, control, or stationing of nuclear explosive devices on the territory of the parties to the treaty.<sup>100</sup> The treaty also prohibits dumping of radioactive wastes in the African Nuclear-Weapon-Free Zone by parties to the treaty.<sup>101</sup> Additionally, the treaty prohibits attacks against nuclear installations by parties to the treaty.<sup>102</sup> The treaty requires installations to maintain the highest standards of care for the physical protection of nuclear materials, equipment, and related facilities that operate for peaceful purposes.<sup>103</sup> Peaceful nuclear activities must fully comply with the International Atomic Energy Agency safeguards.<sup>104</sup> The treaty envisions a verification process that includes the creation of an African Commission on Nuclear Energy.<sup>105</sup> Parties to the treaty retain the competence to determine whether nuclear-powered crafts may be permitted to visit their airports and harbors.<sup>106</sup> The treaty contains three protocols that connect treaty

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94. See Final Text of a Treaty on an African Nuclear-Weapon-Free Zone, *supra* note 90, Foreword by the Secretary-General.

95. See G.A. Res. 53, U.N. GAOR, 1st Comm., 51st Sess., U.N. Doc. A/51/566/Add. 19 (1997).

96. See African Nuclear-Weapon-Free Zone Treaty, 35 I.L.M. 698 (1995) (reprinting the text of the Treaty of Pelindaba with dates of signing). Egypt signed the African Nuclear-Weapon-Free Zone Treaty when it was opened for signature at Cairo on April 11, 1996. See *id.*

97. See Final Text of a Treaty on an African Nuclear-Weapon-Free Zone, *supra* note 90, Annex.

98. See Implementation of the Declaration on the Denuclearization of Africa, G.A. Res. 47/76, U.N. GAOR, 47th Sess., Supp. No. 49, at 82, U.N. Doc. A/47/49 (1992); U.S. Arms Control and Disarmament Agency, 1996 *Annual Report*, ch. I (visited Mar. 31, 1998) <<http://www.acda.gov/reports/chap1.htm>>.

99. See U.S. Arms Control and Disarmament Agency, *supra* note 98.

100. See Final Text of a Treaty on an African Nuclear-Weapon-Free Zone, *supra* note 90, Annex, arts. 3, 4.

101. See *id.* art. 7.

102. See *id.* art. 11.

103. See *id.* art. 10.

104. See *id.* arts. 6, 8.

105. See *id.* art. 12.

106. See *id.* art. 1, para. c.

responsibilities with members of the nuclear club (the United States, France, the United Kingdom, the Russian Federation, and China).<sup>107</sup>

As discussed above, the nuclear-free zones regime is not unique to Africa. These expressions of international lawmaking through the treaty process are complemented by expressions of law and policy by other major institutions of international decision-making (the Security Council, the General Assembly, and the ICJ). Notwithstanding the existence of this regime, however, considerable controversy remains as to what precisely the status of nuclear weapons is in general international law.<sup>108</sup> It is apparent that, despite the African nuclear-free zone regime, the continent will not be immune from the effects of a nuclear catastrophe caused by the intentional or accidental deployment and use of nuclear weapons in any other part of the world. Thus, nuclear-free zones, to be effective, must extend the reach of their agreements.

I suggest that Africa's nuclear weapon-free zone, and others like it, may have a direct influence on the emerging rules, principles, and policies that general international law may prescribe for the control, regulation, and abolition of all nuclear weapons systems. Africa shares a strategic interest with the rest of mankind—the fundamental U.N. promise that we must turn “swords into plowshares” in order to secure peace and security on a universal basis.

The regime of nuclear-free zones on the planet is important from a technical point of view. These regimes do not fit easily into the category of *lex specialis* because, in part, they are not specialized to particular aspects of testing and/or distribution. In fact, within geographically delimited zones they aspire to be completely comprehensive. They thus seek to make a more general contribution that goes beyond control and regulation to clear elimination. A second important aspect of the regimes is that their geographical reach and demographic composition essentially means that a

107. See *id.* art. 4, Protocols I–III. Protocol I invites these powers to neither threaten to use nor use nuclear explosive devices against a treaty party. Protocol II invites members of the club to not test, assist, or encourage testing of nuclear devices within the zone. Protocol III deals with states exercising control over dependent territories in Africa and deals only with France and Spain. The treaty comes into force when the 28th country ratifies it, and the Protocols come into force when Protocol signatories deposit the instruments of ratification after the treaty comes into force.

108. See Bonnie Jenkins & Theodore M. Hirsch, *Arms Control and Development*, 31 INT'L LAW. 561 (1997) (analyzing how various treaties and agreements treat nuclear weapons); Prudence Taylor, *Testing Times for the World Court: Judicial Process and the 1995 French Nuclear Tests Case*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 199 (1997) (exploring concepts expressed by the dissent's opinion in the Nuclear Tests Case); see also CARL H. BUILDER & MORLIE H. GRAUBARD, *THE INTERNATIONAL LAW OF ARMED CONFLICT: IMPLICATIONS FOR THE CONCEPT OF ASSURED DESTRUCTION* (1982) (analyzing the debate on the utility of deterrence); Kevin C. Kennedy, *A Critique of United States Nuclear Deterrence Theory*, 9 BROOK. J. INT'L L. 35 (1983) (discussing the theories and policies fueling the development, deployment, and possible use of nuclear weapons); Peter A. Ragone, *The Applicability of Military Necessity in the Nuclear Age*, 16 N.Y.U. J. INT'L L. & POL. 701 (1984) (discussing the concept of military necessity as a defense to sanction in the law of war, and arguing that it is not unlimited in its application in the nuclear age). On the American deterrence policy, see *THE AMERICAN ATOM: A DOCUMENTARY HISTORY OF NUCLEAR POLICIES FROM THE DISCOVERY OF FISSION TO THE PRESENT* 210–38 (Robert C. Williams & Philip L. Cantelon eds., 2d ed. 1991) (presenting articles and official statements on deterrence); ANTHONY H. CORDESMAN, *DETERRENCE IN THE 1980S: PART I* (1982) (chronicling deterrence strategies since 1950); and GUY OAKES, *THE IMAGINARY WAR: CIVIL DEFENSE AND AMERICAN COLD WAR CULTURE* (1994).



vast physical part of the planet is meant to be nuclear weapon-free in the here and now, and this territorial construct includes a very substantial part of the human population. A third important fact concerning the nuclear weapon-free zones is that they represent the small countries of the planet expressing themselves in a plan of action of concrete global salience. It is therefore crucial that any appraisal of the *lex specialis*, treaty-based regime relating to the control and regulation of nuclear weapons, must be legally assessed against the existence of the nuclear weapon-free zone regimes.

#### IV. *LEX SPECIALIS*: THE TREATY-BASED REGIME

In various arenas of international decision-making, we have seen the practice of severely limiting nuclear tests, especially those in the atmosphere. Strenuous efforts were and continue to be made to give efficacy to the recently renewed Non-Proliferation Treaty.<sup>109</sup> Because the superpowers' nuclear arsenals had indeed been subject to overproduction and over-deployment, major agreements were made to reduce the number of actually deployed weapons in the world.<sup>110</sup> Although it has the raw materials and technical capacity to produce nuclear weapons, South Africa has set the example for Africa: It neither wants nuclear weapons, nor does it want to make or deploy them.<sup>111</sup> It is strongly in favor of a vigorous regime of nonproliferation. In effect, the nation's policy affirms other African voices that urge that the continent should be a nuclear weapons-free zone in form and fact. The South African example is an important precedent for small states that may harbor the desire to become nuclear powers and also sets a good example for universalizing the nonproliferation regime.

The emergent regimes aiming to reduce the size of nuclear arsenals with a long-term goal of their complete elimination have also generated a more acute consensus about another danger. How is the international community going to dispose safely of the vast amount of contaminated nuclear waste?

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109. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 52. On May 11, 1995, the Non-Proliferation Treaty was extended. See Final Document on Extension of the Treaty on the Non-Proliferation of Nuclear Weapons, U.N. Doc NPT/Conf.1995/32 (Part I), reprinted in 34 I.L.M. 959 (1995).

110. The process of agreements on a bilateral basis involving the United States and the Soviet Union began with the ABM process. See Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3437 [hereinafter Anti-Ballistic Missile Treaty].

111. South Africa is the only signatory country in the Treaty on Non-Proliferation of Nuclear Weapons that voluntarily discontinued its nuclear capability before signing the agreement. See Waldo Stumpf, *South Africa's Nuclear Weapons Program: From Deterrence to Dismantlement*, ARMS CONTROL TODAY, Dec. 1995-Jan. 1996, at 3; see also Final Text of a Treaty on an African Nuclear-Weapon-Free Zone, *supra* note 90, Annex; FROM DEFENCE TO DEVELOPMENT: REDIRECTING MILITARY RESOURCES IN SOUTH AFRICA (Jacklyn Cock & Penny McKenzie eds., 1998) (arguing for demilitarization as a means of furthering South Africa's democratic transition); Albright, *supra* note 86, at 46-47 (analyzing reasons why South Africa developed a nuclear arsenal but then ordered its destruction, and detailing the historical turning points in the South African nuclear program).

Lingering fears exist that policymakers may seek to use weak, vulnerable Third World nations in Africa and elsewhere as the most "rational dumping ground."<sup>112</sup>

These trends have taken place in light of the ICJ's unwillingness to declare openly that Australia's claim to be free from the contaminant effects of French nuclear testing was supported by a violation of international law.<sup>113</sup> It is vital that we now carefully characterize the regime's nature relating to the control and regulation of nuclear weapons as it has emerged from the welter of global, regional, and bilateral undertakings to determine exactly what this regime is and in what direction it is headed.

#### A. *The Conceptual Basis of the Current Regime*

By the 1960s, the nuclear arms race had simply gotten out of hand. Nuclear arsenals in the possession of the superpowers had the capacity to destroy life on Earth many times over. Many recognized nuclear weapons to be the primary threat to international peace and security, and in a larger sense, to eco-social survival. The emerging treaty-based regimes sought to prevent nuclear weapons proliferation,<sup>114</sup> suspend testing,<sup>115</sup> reduce the stockpiles of weapons,<sup>116</sup> and increase systems for verification of the reduction in stockpiles.<sup>117</sup> Nuclear club members became increasingly ardent supporters of these prescriptions.<sup>118</sup>

In 1995, the Non-Proliferation Treaty, a cornerstone of global policy, was indefinitely renewed.<sup>119</sup> The agreement's framework included declarations by the Security Council's permanent members, and, as Professor Reisman has written, established the following principles:

- (1) that in the future, individual states holding nuclear weapons should do so not by virtue of inherent sovereignty, but under the "authority of the international community;"<sup>120</sup>
- (2) that the international community's competence is recognized for determining the conditions under which nuclear weapons are held;<sup>121</sup>

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112. The question of the safe management and storage of radioactive wastes has been an increasingly international problem as indicated in the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Sept. 5, 1997, 36 I.L.M. 1436 (1997).

113. See *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253, 287 (Dec. 20).

114. See, e.g., *South Pacific Nuclear Free Zone Treaty*, *supra* note 89, art. 3 (renouncing the possession of nuclear explosive devices).

115. See, e.g., *id.* art. 6 (banning testing).

116. See, e.g., *id.* art. 3 (renouncing possession of nuclear explosive devices).

117. See, e.g., *id.* arts. 8-10 (seeking to increase systems of verification to reduce stockpiles).

118. See *Final Document on Extension of the Treaty on the Non-Proliferation of Nuclear Weapons*, *supra* note 109.

119. See *id.*

120. Reisman, *supra* note 92, at 480.

121. See *id.*

- (3) that the Security Council's permanent members are, in effect, "licensed" by the international community as lawful holders of nuclear weapons;<sup>122</sup> and
- (4) the corollary principle that other members of the international community cannot now lawfully acquire such weapons.<sup>123</sup>

#### B. *The Legal Status of Nuclear "Licensees"*

The regime of nonproliferation has serious implications for principles of sovereignty and national security under which states would normally justify the possession and deployment of nuclear weapons. There are two views of the legal implications of this regime. One holds that under this regime, the price of major powers' keeping their weapons is that they hold them as "licensees" for the international community as a whole.<sup>124</sup> Sovereignty is subordinated to the principle of international obligation. This seems, on the surface, to be almost a revolution in international law doctrine. But there is a second, more skeptical, construction that rejects the notion that the treaty limits state sovereignty any more than the letter of the agreement.

Professor W. Michael Reisman endorses the first reading, suggesting that there may be an implied or constructive obligation analogous to that of a "licensee" on the part of those members who hold nuclear stockpiles, but agree to discourage or not to commit acts of nuclear proliferation.<sup>125</sup> I suggest that this is a troublesome construction of the Non-Proliferation Treaty. A domestic law meaning of the term "licensee" might under Hohfeldian analysis mean that the nuclear powers have a "privilege," the corollary of which is that they have "no right."<sup>126</sup> This seems to be an implausible meaning and simply not in accord with the plain meaning of the treaty-based regime. On the other hand, the term "licensee" could derive a meaning from the term "license." Here the term is broader than the term "liberty" in the sense that in moral discourse the ordinary meaning given to "liberty" is that it does not include license, a concept which implies the abuse of liberty. In short, this gloss on the term "licensee," as analogized to the nuclear weapons regime, clearly is not designed to give the club of nuclear weapons holders a license to do as they see fit.

The above view is not an implausible construction, but its justification—if one can be implied—is to suggest a relatively strong *Lotus*

122. *Id.*

123. *Id.*

124. *See id.* at 481; cf. *Reddington v. Beefeaters Tables, Inc.*, 240 N.W. 2d 363, 366 (Wis. 1976) (defining a licensee as a "person who has a privilege to enter upon land arising from the permission or consent, express or implied, of the possessor of land but who goes on the land for his own purpose rather than for any purpose or interest of the possessor").

125. *See Reisman, supra* note 92, at 481–82 (describing nuclear signatories as licensees under the nonproliferation regime).

126. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 38–39 (1964).

basis in theory<sup>127</sup> for the NPT nuclear club members, and a strong treaty obligation for all others (a sort of non-*Lotus* theory). It is possible that what inspires this distinction is an analogy to the structure and functions of the Security Council permanent members, who have enhanced powers of sovereignty. Each can exercise a veto over matters within the jurisdiction of the Security Council. The built-in veto is, of course, inconsistent with a literal concept of the legal equality of states.<sup>128</sup> However, there is a universal, community-wide acceptance of the concept of permanent members holding a special standing in matters of international peace and security. The veto is a necessary component of the competence of permanent members. However, we must appreciate that the licensee construction comes in the context of a regime operating in a less institutionalized context than the Security Council. Moreover, it comes without the transparency, checks, balances, and structure of deliberations of the Council. If this is the implicit assumption of Professor Reisman's "licensee" construct, then the use of this legal analogy is freighted with too much ambiguity and discretion.

A further concern about the licensee analogy is that it may not be consistent with the pragmatic purpose of the NPT regime. This principle seeks to freeze the danger of the spread of nuclear weapons and promote disarmament, while diminishing the risks of the threat, use, or accidental use of nuclear weapons. The NPT's prime justification is that it is a vital practical step toward the complete elimination of nuclear arsenals. Viewed in this light, the idea that nuclear weapons states hold their weapons as licensees may run into the real danger of freezing the monopoly over the possession of these weapons in the hands of a few powerful states. If this position becomes widely perceived, it could undermine the practical objectives of the NPT regime.

One might also read into the NPT the perspective that the legal status of the nuclear powers is not one analogous to a licensee (whatever this latter term means). Rather, it is one of tenuous legality, obliging them to change in light of the normative guidance proffered by the ICJ and the more generally held expectation that complete abolition is a licit and urgent objective. In short, we should avoid the paternalism implicit in the "licensee" model. Rather, we should accept an uncomfortable compromise (a far from ideal one), but one sustained by the realism and gravity of the problem inherent in the threat or use of nuclear weapons in an unstable "global war system."<sup>129</sup>

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127. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). The *Lotus* case established the principle that restrictions upon the sovereignty of states cannot be presumed. This means states have the competence under this theory of sovereignty to advance their interests as they see fit in the absence of a specific rule of international law limiting the exercise of sovereign competence. A strong *Lotus* theory essentially means that the principle of sovereignty is given great weight at the expense of a presumed obligation to limit the sovereignty of the state. A very strong *Lotus* theory would of course be comparable with a considerably expanded conception of self-defense under Article 51 of the U.N. Charter. Thus, claims to nuclear arsenals based on a strong *Lotus* theory would in effect expand the conception of what is justifiable security preparedness under international law.

128. See BARDON FASSBENDER, *U.N. SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE* 287-95 (1998) (discussing the tension between the veto and the equality principle of the U.N. Charter).

129. This term is taken from an earlier Reisman article. See Reisman, *supra* note 30, at 7.

Reisman's licensee concept seems to opt for "stability," which in this sense means that those who have weapons may keep and, within limits, develop them. Those who don't have them, won't have them. Pressing the analogy of a nuclear juridical "licensee" may thus be conceptually flawed and may misdirect expectations from the goal of complete eradication.

An alternative principle implicit in the NPT regime, and, in my view, the more normatively satisfying one, is that the NPT must be seen as a pragmatic part of an expedient, broader effort to change the nuclear era to a non-nuclear era. It must, therefore, be seen not only as the cornerstone of a *sui generis* regime, but as part of a general pattern of juridical expectations including expectations about *change*. The recent ICJ opinion in the *Nuclear Weapons* case<sup>130</sup> helps clarify the legal issue. At the heart of that opinion, the ICJ appears to marry pragmatism (perhaps a soft *Lotus* theory)<sup>131</sup> as it relates to the narrower issues of survival, sovereignty, and self-defense, not to a legal status quo, but to a vista of juridically guided legal change in the practice of international relations. The hard law relating to the nuclear weapons issue should not be seen as a reified artifact. The law as it is must purposefully weave into and guide the law that is imminent. That is to say, the law that "is" is not severed from shaping the law that is about to "be." In short, the court's analysis sought to consolidate the good that had been accomplished regarding the control and regulation of nuclear weapons with a commitment to the normative guidance of legal change toward a regime of complete abolition and universal proscription. Mediating between what is and what ought to be—which, as we shall observe, the court has done—presents a more promising construction of the promise and obligations in the NPT regime than Professor Reisman's inadvertent homage to the politics of effective power.

Evidence as to the actual behavior of nuclear weapons states puts Professor Reisman's formula into question. Efforts to develop smaller, cleaner, more advanced nuclear weapons continue to be on the agenda of some of the major powers. The recent report of the Natural Resources Defense Council (NRDC) adds credence to the concern about an expeditious evolution to abolition or more plausibly to the licensee-trustee development of new generations of weapons of mass destruction.<sup>132</sup> The NRDC report, relying upon documents retrieved under the Freedom of Information Act, reveals that

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130. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8).

131. A soft *Lotus* theory is essentially a position that subordinates the doctrine of the *Lotus* case or ameliorates it in order to enhance the concept of international obligation. In this context, it essentially means that concepts like survival, sovereignty, and self-defense must be strictly and narrowly construed so as to enhance the concept of international concern generated by the threat of and/or use of nuclear weapons.

132. See CHRISTOPHER E. PAINE & MATTHEW G. MCKINZIE, END RUN: THE U.S. GOVERNMENT'S PLAN FOR DESIGNING NUCLEAR WEAPONS AND SIMULATING NUCLEAR EXPLOSIONS UNDER THE COMPREHENSIVE TEST BAN TREATY (1997); see also Comprehensive Nuclear Test Ban Treaty (CTBT), opened for signature Sept. 24, 1996, S. Treaty Doc. 105-28, available at 1996 WL 924706 (increasing international restrictions by prohibiting the testing of nuclear weapons).

the U.S. Government's "stockpile" stewardship and management plan (SSMP) would circumvent the primary objectives of the Comprehensive Nuclear Test Ban Treaty.<sup>133</sup> According to the report, there is evidence of a "deliberate and systematic program by a treaty party to render the CTBT's constraints *less effective*" in such a way that "would over time overcome" these constraints."<sup>134</sup> According to this report, the United States is planning to implement the SSMP as follows:

significantly expand its base of nuclear weapons knowledge by building extensive above-ground experimental (AGEX) facilities for nuclear weapons physics and conducting underground high-explosive experiments with plutonium and other nuclear materials at the Nevada Test Site;

develop within the coming decade comprehensive three-dimensional, computer simulations of nuclear weapons performance—a "virtual testing" capability;

develop and integrate into existing weapons improved components, such as new radars, detonators, neutron generators, and boost-gas transfer systems;

rebuild and certify the performance of weapons with modified nuclear (plutonium "pit" and uranium "secondary") components;

modify and repackage existing nuclear weapons . . . and conduct flight-tests to certify their ability to provide an improved military capability by withstanding the stresses of a new stockpile-to-target sequence (STS), such as high speed earth penetration to destroy hardened underground targets with reduced collateral damage;

design, simulate, and flight-test weapon prototypes, and certify both the nuclear and stockpile-to-target performance of new weapon designs as possible replacements for existing stockpile weapons.<sup>135</sup>

Although the SSMP seems to compromise the Comprehensive Test Ban Treaty, in a larger sense it compromises Professor Reisman's "licensee" construct as well. The revelations from the Natural Resources Defense Council document do not inspire faith in state conduct as licensee, trustee, mandatory, paterfamilias, or any of the other analogies drawn from the perspective of comparative private law of the global community.

The licensee theory also suffers in light of the exposures of the scandal involving the transmittal of nuclear weapons data to China.<sup>136</sup> This raises three key concerns. First, the enhanced scope of developing nuclear arsenals, notwithstanding the treaty-based regime, seems to be an ongoing reality. Second, the business of espionage represents a critical threat to the formal regime of nonproliferation in general. Third, legislative efforts to deploy, when technically feasible, a new missile defense system would appear to have the effect of unilaterally abrogating the 1972 Anti-Ballistic Missile Treaty

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133. According to its Preamble, the CTBT's objective is "to contribute effectively to the prevention of the proliferation of nuclear weapons in all its aspects, to the process of nuclear disarmament, and therefore to the enhancement of international peace and security." Comprehensive Nuclear Test Ban Treaty, *supra* note 132, pmbl.

134. PAINE & MCKINZIE, *supra* note 132, at 2.

135. PAINE & MCKINZIE, *supra* note 132, at 3.

136. See James Risen, *U.S. Fires Researcher It Suspects of Giving A-Bomb Data to China*, N.Y. TIMES, Mar. 9, 1999, at A1.

with Russia.<sup>137</sup> This provides for a further level of skepticism regarding Professor Reisman's "moderate" construct of the nuclear weapons regime.

However, these above reservations do not diminish the conceptual clarity of a hard law reading of the international regime. Under such a scheme, the nuclear powers commit themselves:

- (1) not to use nuclear weapons against states that are non-nuclear powers;
- (2) to assist a non-nuclear state threatened or attacked by nuclear weapons; and
- (3) to work toward strategies for reducing nuclear stockpiles with a view to total nuclear disarmament.

Presumably, the state of total nuclear disarmament could mean the outlawing per se of nuclear weapons. This, at least, seems to be the understanding of treaty-based commitment reasonably construed.

## V. THE INTERNATIONAL COURT OF JUSTICE AND THE OUTLAWING OF NUCLEAR WEAPONS

On May 14, 1993, the World Health Organization (WHO) requested an advisory opinion from the ICJ. The legal question presented was the following: "In view of health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?"<sup>138</sup> The WHO request was followed on December 23, 1994, by the request of the U.N. General Assembly for an advisory opinion as follows: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"<sup>139</sup> On July 8, 1996, the ICJ rendered its advisory opinion.<sup>140</sup>

The court's opinion canvasses a wide range of areas of international law directly or indirectly relevant to the problem. While concern exists in some quarters that the court has gone too far, or that the court has not gone far

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137. Anti-Ballistic Missile Treaty, *supra* note 110; Protocol to the ABM Treaty, July 3, 1974, U.S.-U.S.S.R., 27 U.S.T. 1645. See Joseph Galloway et al., *Seeking a Silver Bullet Once Again, an Expensive Quest for a Missile-defense Shield*, U.S. NEWS & WORLD REP., Mar. 29, 1999, at 30; Paul Leavitt & Susan Page, *Anti-missile Shield System Fails for 6th Consecutive Time*, USA TODAY, Mar. 30, 1999, at 13A ("The Pentagon suffered another setback Monday in efforts to develop an anti-missile system to protect troops and bases against more sophisticated ballistic missiles being stockpiled by hostile forces."); *Support Gathers Steam for National Missile Defense*, AVIATION WK. & SPACE TECH., Mar. 22, 1999, at 29 ("If approved by Congress as a whole, the National Missile Defense Act of 1999 would codify as U.S. policy a commitment to deploy as soon as technologically possible an effective NMD system.").

138. Weiss et al., *supra* note 8, at 724.

139. Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, G.A. Res. 49/75K, U.N. GAOR, 49th Sess., Supp. No. 49, at 71, U.N. Doc. A/49/49 (1995).

140. See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8).

enough, or that there is uncertainty as to exactly where the court has gone, I submit that taken as a whole, the judgment does a great deal to strengthen the prescriptive force of international law and to consolidate expectations clearly discernible about the scope and character of legal regulation. The opinion provides a framework for an informed discourse with an important role for international lawyers in the center of this global conversation. Perhaps the conversation inaugurated is supported by factors that define the "hard law" of nuclear weapons and at the same time seeks to more firmly establish a "soft law" of complete eradication in the future. These are not assumptions shared by all members of the court, especially the vice president, Judge Weeramantry.<sup>141</sup>

The court's opinion examines the relationships between nuclear weapons and humanitarian law, the law of the environment, and the law relating to the permissible use of coercion in international law. The opinion also covers the interpretation of treaty obligations and the expectations generated by variously situated commitments to determine whether the requisite *opinio juris* is there to ground obligations in customary international law. Other opinions, including those in partial dissent, add significantly to the importance of law and of international lawyers in this difficult, but vitally important, arena.

It may be of value to start this appraisal of the court's opinion with the assessment of a major critic, Professor Richard Falk. Professor Falk holds that the advisory opinion finds the "elusive middle ground between geopolitical deference and defiance, as well as repudiating the moral consensus of international society and translating this moral consensus into a political mandate."<sup>142</sup>

What exactly does Falk mean by the term "elusive middle ground"? This "middle ground" is important, as it is the ground that underscores the area of distinct juridical concern and competence. How much "flexibility" is there in this juridical continuum in which the "elusive" middle defines the competence of the highest judicial tribunal—the U.N. system? What kind of discourse, standards, and principled criteria have to be invoked to secure this prudential exercise of judicial power? One way to make sense of the court's decision is to accept the idea that the geopolitical middle ground is indeed juridically elusive and to refocus the lens of the critical observer: perhaps we can see in the holdings of the judges a heuristic continuum from complete abolition at

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141. See *id.* at 433 (Weeramantry, J., dissenting). Judge Weeramantry wrote the most widely cited dissenting opinion. He agrees with the court's discussion on the limitation of nuclear weapons in terms of the U.N. Charter and the prohibition of methods of warfare resulting in environmental damage. However, Judge Weeramantry has several strong critiques of the majority opinion. The judge argues that the court's opinion should have held "directly and categorically that the use or threat of use of the weapon is unlawful in all circumstances without exception," *id.*, and he further reasons that the U.N. Charter, humanitarian law, the severe nature and effects of nuclear weapons, and the international community's attitude towards nuclear weapons, all point to a more forceful and vigorous call by the court for the complete prohibition of the use of nuclear weapons. See *id.* at 434.

142. Richard Falk, *The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 333, 349 (1997) (citations to ICJ cases omitted).



one end to the possibility of permissive use at the other. Where exactly the court lies on that continuum requires sharper focus. In my view, the “extreme circumstances” exception for self-defense<sup>143</sup>—and construction of Article VI of the NPT mandating the pursuit of good faith negotiations to achieve “effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament”<sup>144</sup>—move us quite far from the “elusive” middle. The court seems implicitly sensitive to the fact that there is widespread, articulate support for outright abolition in state and non-state actors alike, and that the struggle will impact the legal change implied by the obligation to negotiate. The court has, in fact, opened the door to further agitation, interest articulation, and further international pressures to finally proscribe nuclear weapons without exception. Moreover, the narrow exception seems hardly practical as a strategic defense perspective, unless the term “survival” does not actually mean “survival,” as used by the court. The court says:

The legal import of the obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.<sup>145</sup>

The court’s holdings have in fact provided a considerable degree of judicial clarity about the role of law in seeking to outlaw the threat and/or use of nuclear weapons. There is of course ambiguity in parts of what the court has actually prescribed. For example, the court’s unwillingness, as a matter of hard law, to declare categorically the threat and/or use of nuclear weapons unlawful in limited self-defense circumstances is not without ambiguity. Indeed, this exception is itself qualified by the acknowledgment that there is a more general continuing obligation for all states in the area of disarmament and the general community expectation to negotiate an end to the nuclear weapons’ threat to the Earth-space community.

Critics of the opinion, like Judge Weeramantry, would have required a clear and unambiguous juridical statement from the court that nuclear weapons are incompatible with international law in the here and now. Judge Weeramantry, like the other judges on the court, must grapple with a basic principle of international adjudication that in general allocates certain matters to the domestic jurisdiction of a state, and other matters to the purview of legitimate international concern. In the international context, matters of international concern are vested with both political and legal importance. This is especially true in matters relating to international peace, security, and claims to self-defense. The *Nicaragua* case<sup>146</sup> remains highly controversial

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143. *Legality of Nuclear Weapons*, 1996 I.C.J. at 263, 266.

144. *Id.* at 264.

145. *Id.*

146. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J.

because the Cold War-inspired interventions in Nicaragua's internal affairs by the United States were deemed to be matters within the purview of international jurisdictional concern, and within the competence of the key juridical arm of the international legal system, the ICJ.

In the *South West Africa* decision,<sup>147</sup> the ICJ declined to decide the international legal status of the League of Nations mandate as it applied to South West Africa (now Namibia) and South Africa's administration of the "territory" on the grounds that the complaining parties had not established their legal standing to prosecute the claim. Implicit in the ruling, however, was the concern that the issue was really "political" and more appropriately resolved in the political branches of the international constitutional system, namely, the U.N. General Assembly. It is worthy of note that the General Assembly had done just that. They in effect accepted "jurisdiction" over the mandate controversy, and by decision, terminated it.<sup>148</sup> This decision was supported, in effect, by the U.N. Security Council.<sup>149</sup> However, having made the "political" choice of terminating South Africa's status as the mandatory power over South West Africa, the General Assembly requested an advisory opinion from the ICJ as to the legal consequences of its action. The role of the court here was not primary; it considered a political matter, vested with clear and present threats to international peace and security. The court responded to the request, which gave it powerful juridical imprimatur over a "security" matter.

The foundational problem of the allocation of competence regarding the threat and/or use of nuclear weapons involves two lines of juridical inquiry. The first line is the technical question of who might claim the competence to request an advisory opinion. Assuming the requesting parties have the legal right to present such a request, there is still a technical and prudential issue about the competence of the WHO, the General Assembly, and the court. As a prudential matter, there are some advantages in the court rendering an "advisory" opinion rather than one in the form of contentious proceedings. For one thing, the requesting parties (the WHO and the General Assembly) are institutional actors that represent a broad cross section of international public opinion. The perspectives represented are not solely confined to those who already monopolize nuclear technologies. Additionally, the procedural capability of states to join in the proceedings in written memorials and oral representations permits a broad spectrum of articulate interests to be expressed.

The second line of inquiry must focus on how the court itself defines its competence to issue an advisory opinion and the standards and criteria it uses to define that competence. Indeed, the court's use of the advisory opinion

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1 (June 27).

147. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21) (referring to General Assembly Resolution 2145 XXI).

148. See *id.* at 50-51.

149. See *id.* at 51-54.

mechanism has enormously sharpened and enriched the discourse about the legal status of nuclear weapons. In short, the mechanism and process of an advisory opinion broadens the level of interest-participation in a crucial global debate, and underscores the importance of legal discourse and *a fortiori* of international law in seeking to clarify and ultimately to secure the common interests of the entire Earth-space community. How the juridical perspective plays itself out in the actual decisions of the ICJ is a subtle but critical matter as the substantive holdings of the court indicate.

A. *Participation in the Discourse: The WHO, the General Assembly, the ICJ, and Civil Society*

The request for an advisory opinion came from the World Health Organization and the General Assembly of the United Nations.<sup>150</sup> These are not sovereign states, although U.N. membership is restricted to sovereign states. As an institutional matter, these requests emerge from non-state institutional actors. The WHO is a specialized agency of the United Nations concerned with world health matters.<sup>151</sup> The General Assembly is a political body with narrow lawmaking capacity, but with broad powers of "inquiry" and the power to make recommendations on matters dealing with the U.N. Charter's goals and purposes. Why would a body specialized in health care matters be interested in a legal opinion about a matter seemingly charged with geopolitical implications and strong claims to exclusive sovereign competence by some states? Without canvassing the voting records of health care organizations about the legitimacy of using nuclear weapons, we may assume that the medical profession (operating through the WHO) was insisting that its concerns and fears be adequately voiced through the appropriate juridical and political channels.

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150. Article 96(2) of the U.N. Charter allows specialized agencies of the U.N. to request advisory opinions within the scope of their activities, as authorized by the General Assembly. *See* U.N. CHARTER, art. 96, para. 2. The General Assembly provided blanket authorization to the WHO covering "legal questions arising within the scope of its competence." G.A. Res. 124(II), U.N. GAOR, 2d Sess., U.N. Doc. A/124 (1947). Article 96(1) of the Charter allows both the General Assembly and the Security Council to request an advisory opinion of the ICJ "on any legal question." U.N. CHARTER art. 96, para. 1.

151. The question of whether the WHO was competent to present questions on the health and environmental aspects of the use of nuclear weapons, and, in particular, whether from this perspective a state would be in breach of its international legal obligations by neglecting obligations under the constitution of the WHO, was carefully dealt with by the ICJ. Essentially, the court held that the WHO request did not relate to the effects of nuclear weapons on health, but to the lawfulness of the use of nuclear weapons from the perspective of their environmental and health-related consequences. *See* *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 232-38 (July 8). This is a subtle, but not necessarily compelling, distinction. It does, however, pose an important question of principle about broadening the level of participation in the processes of international adjudication. It can be said with confidence that as a practical matter, the WHO request finally did generate an advisory opinion, even if technically the court had held that the specific request was beyond the scope of the WHO constitution. *See id.*

The fact that the WHO sought an advisory opinion from the ICJ is interesting. If the court accepted the WHO request on this issue, it would in effect be bringing another important professional voice and a broader discourse to the issue of nuclear weapons and world order matters. In short, one might conceive of the role of the ICJ in such a case as bringing a distinctively juridical perspective to the global discourse about the status of nuclear weapons, world peace, security, and survival. The WHO request would have had the effect of functionally broadening the discourse about nuclear weapons by forcing the court to take into account the juridical nature of health, well-being, and environmental concerns. The joinder of environmental and health care concerns with their legal consequences would also implicate the status of nuclear weapons and world order. Although the court had ruled against the WHO's request on highly technical grounds,<sup>152</sup> it is instructive to recognize, as I shall shortly suggest, that the forces behind the WHO and the General Assembly were in part moved by anti-nuclear pressure groups including professional groups who are influential constituent members of global civil society.

The role of the modern international lawyer is also clearly affected by the ICJ decision, since the ICJ opinion disposes in substantial measure of the idea that a serious discourse about the threat and/or use of nuclear weapons is a matter exclusively confined to sovereign states, members of the nuclear club, or the political security specialists of sovereign states. What the court has clearly done is to provide a framework through which the structures of

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152. The opinion of the court in the *Legality of Nuclear Weapons* case should be contrasted with the dissent of Judge Weeramantry. See *Legality of Nuclear Weapons*, 1996 I.C.J. at 433 (Weeramantry, J., dissenting). According to Judge Weeramantry, WHO clearly has a legal interest in presenting its request for an advisory opinion based on both a textual and a teleological construction of the WHO Constitution. The reasoning is systematic and clear:

- (1) The WHO has an interest in matters related to global health, even though these issues also concern questions of peace and security.
- (2) The WHO has an interest in environmental matters, even though they also concern questions of peace and security.
- (3) The fact that other organs in the U.N. system are expressly charged with responsibilities in the area of peace and security does not preclude the WHO from concerning itself with matters of peace and security to the extent that they affect global health and the global environment.
- (4) There are compelling medical and environmental reasons which require the WHO to take an interest in the matter on which it seeks an opinion.
- (5) There are several constitutional provisions rendering the requested opinion relevant to the WHO.
- (6) The impossibility of curative steps forces the WHO into the area of prevention.
- (7) The WHO has a legitimate interest in knowing whether the use of nuclear weapons constitutes a violation of state obligations in relation to health.
- (8) The WHO has a legitimate interest in knowing whether the use of nuclear weapons constitutes a violation of state obligations in relation to the environment.
- (9) The WHO has a legitimate interest in knowing whether state obligations under its own Constitution are violated by the use of nuclear weapons.
- (10) There are state obligations under international law in regard to health which would be violated by the use of nuclear weapons.
- (11) There are state obligations under international law in regard to the environment which would be violated by the use of nuclear weapons.
- (12) There are state obligations under international law in regard to the WHO Constitution which would be violated by the use of nuclear weapons.

See *id.*

legal reasoning and legal justification might become an important part of the discourse about the fate of nuclear weapons as we approach the millennium.

The General Assembly as indicated requested an advisory opinion on December 15, 1994 on the issue of whether "the threat or use of nuclear weapons in any circumstances [was] permitted under international law."<sup>153</sup> At the heart of the request was the issue, as suggested earlier, of whether the rule of law should be subordinated to the rule of sovereign political power. As Professor Falk has indicated, the issue was "a geopolitically hot issue,"<sup>154</sup> requiring juridical consideration in the face of strongly expressed concerns that matters of state policy and politics, characteristic of important security matters, not be subject even to advisory review.

Certainly, as one reviews the role of nongovernmental organizations (NGOs) in advancing the fundamental security concerns that nuclear weapons pose, one may see an indicator of a widespread apprehension about the state of nuclear weapons as we approach the millennium. Professor Falk has insightfully drawn attention to the World Court Project, which was created to focus on the problem of the legal abolition of the threat and/or use of nuclear weapons.<sup>155</sup> The project has been sponsored by such NGOs as the International Peace Bureau, the International Physicians for Social Responsibility, and the International Association of Lawyers Against Nuclear Arms.<sup>156</sup> These pressure groups directly influenced the WHO and the General Assembly's request for an advisory opinion from the International Court of Justice on the basic questions relating to the legality of nuclear weapons. The doctrinal importance of this insight is that it undermines the classical distinction that international law is essentially a public matter, and that the private participation of civil society in its making and application must be relegated to the margins of the international legal process. Of course, the International Court of Justice does not entertain jurisdiction with respect to individuals and private associations. However, its decision in the nuclear weapons case could not have happened without NGOs and an aggressive civil society playing active roles in the invocation of its jurisdiction through the relevant institutions of the United Nations (WHO and the General Assembly).

However, not all that emerges from civil society is laudable. As Professors Lifton and Markusen<sup>157</sup> have reminded us, leaders in the legal and scientific communities as well as NGOs were not only deeply implicated in the creation of a nuclear weapons culture, they were also deeply implicated in the Nazi version of genocide.<sup>158</sup> In spite of this, the role of civil society was

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153. G.A. Res. 49/75K, U.N. GAOR, 49th Sess., Supp. No. 49, at 71, U.N. Doc. A/49/49 (1995).

154. Falk, *supra* note 142, at 340.

155. *See id.* at 339-47.

156. *See id.* at 341-42.

157. *See generally* LIFTON & MARKUSEN, *supra* note 15 (describing the role of civil society in both the Holocaust and the production of nuclear weapons).

158. *See, e.g., id.* at 98 ("You see what happened to me—what happened to the rest of us, is we

vitaly important in bringing pressure that ultimately provided a basis for reasoned, informed discourse about the threat and use of nuclear weapons in international society. Implicit in the broader context of the nuclear weapons advisory opinion is the important role of effective participation in the making and application of international law. It is clear that there is a wider universe of participants in this process than only sovereign states.

### B. *Specific Holdings of the ICJ and Institutional Competence*

There are in essence six primary substantive issues to which the court responds. Indeed, a short review of the key holdings of the court will graphically underscore the deft subtlety of the court's response to the request for an advisory opinion. First, regarding the issue of whether international law authorizes the threat or use of nuclear weapons, the court holds that there is in neither conventional nor customary international law a "specific authorization" for the threat or use of nuclear weapons.<sup>159</sup> This of course sets the stage for the court's more ambiguous holding that relates to self-defense and national survival. It is obvious and uncontroversial that international law in general does not specifically authorize states to use nuclear weapons or develop them. The critical term here is "specific authorization." The second holding in this context establishes the complementary prescriptive principle that international law neither specifically nor comprehensively proscribes, in a universal sense, the threat or use of nuclear weapons.<sup>160</sup> This too is uncontroversial, but it does establish a kind of general legal gap that has to be supplemented within the boundaries of prudent judicial intervention.

The third substantive holding ties in specifically to the Charter's Article 2(4) (stipulating that all members refrain from the threat or use of force against any state) and Article 51 (allowing self-defense in the event of an armed attack). These provisions relate to the prohibition of aggression and self-defense. Here the court holds that a threat or use of nuclear weapons that cannot meet the standards of Article 51 would be a violation of Article 2(4), and hence would be unlawful.<sup>161</sup> A fourth substantive holding requires that the issue presented in the request also be appraised against the evolution of treaty-based law dealing with various aspects of nuclear arsenals as well as against the principles of humanitarian law.<sup>162</sup> These four substantive holdings

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started for a good reason, then you're working very hard to accomplish something, and it's pleasure, it's excitement. And you just stop thinking, you know, you stop." (quoting Richard Feynman)). Lifton and Markusen present a similar view from a critic of those scientists:

These guys take a lot of satisfaction in knowing they're going to be consulted over whether civilization will be destroyed or not . . . It's a hubris, or arrogance, which says, "We are really bright guys and we can keep the country from doing ridiculous things." . . . And they're totally unaware that they're just being used by some little, puddin'-headed guy in the Pentagon.

*Id.* at 133 (quoting a critic of the elite group of scientists working on nuclear weapons).

159. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 266 (July 8).

160. See *id.*

161. See *id.*

162. See *id.*

establish an important juridical principle: that notwithstanding the political nature of this "geopolitical hot potato," the problem is vested with critical elements of international juridical concern and consideration falls within the competency of judicial discourse.

The fifth major substantive holding makes a critical point about the continuing relevance of the rules relating to the *ius in bello*, especially the rules of humanitarian law. Here the court concludes that in general the threat or use of nuclear weapons would "be contrary to the rules of international law applicable in armed conflict."<sup>163</sup> A second part of this holding, however, is most vital. Here the court states:

in view of the current state of international law, *and* of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.<sup>164</sup>

This could be seen as avoiding a core issue. Certainly it is possible to impute such a characterization to the slim majority role in this issue. However, the crucial interpretive word in this sentence is "and." This word supplies a conjunctive rather than disjunctive meaning to the words "international law" and "fact." Read conjunctively, the "and" suggests that the construction and interpretation of international law is not a purely doctrinal exercise, but its meaning, scope, and salience are often a function of context. This suggests that the central legal issue involves the construction and interpretation of fact and law. In this posture, the confirmation or modification of an international legal norm represents the challenge of managing change in the adjudicatory process of the ICJ, whether "molecular" or "molar." This point is important because it defines the prudential scope of judicial versus administrative, political, or executive competence. The deft gloss of this statement on the scope of the court's reviewing competence lies in the fact that the court has sought to exercise a degree of deference, which is subtly delimited. The implications are that it cannot decide the issue now, but it is a matter that could be juridically determined in the future, under the right juridical circumstances. This might include accounting for changing expectations regarding both treaty law and customary law, as well as making a clearer delineation of crucial factual contingencies, viewed as an important (expectation-creating) discourse. All of these factors might in the future move the court to an outright declaration of illegality, consistent with major expectations of the international community as a whole. In other words, this part of the holding does not need to be categorically construed as *non liquet*. In this I agree with Professor Burns H. Weston's characterization of the

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163. *Id.*

164. *Id.* (emphasis added).

holding.<sup>165</sup> The language and context suggest a more subtle calculation of the judicial role in this advisory opinion.

Professor Weston also believes that a conceptual typology of diverse factual contingencies might have been useful to the court to avoid what he sees as a nonresponse to the core issue. Weston's typology focuses on nuclear uses such as tactical defense uses, and threats of first and second strike strategic and defensive uses.<sup>166</sup> In my view the court is partially correct when it states that it "will simply address the issues in all their aspects by applying the legal rules relevant to the situation."<sup>167</sup> But it pragmatically declines to conjure up hypothetical scenarios for various kinds of weapons. Weston argues that the advisory opinion is "incapable of the detail and precision that are characteristic of rulings in actual cases and controversies, as in contentious proceedings."<sup>168</sup> While the search for reasonable justification with regard to every scenario and every kind of nuclear weapon is indeed simply juridically impossible, the aggregate estimation of the totality of the threat does permit a prescription of an articulate legal standard of reasonableness in context, including self-defense interests.

The construction we have given the fifth holding of the court seems to dovetail into the sixth holding although the vote on the fifth issue was seven to seven and the vote on the latter was unanimous. The sixth holding is that "there exists an obligation [under Article VI of the 1968 NPT] to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all aspects under strict and effective international control."<sup>169</sup> The difference in the voting pattern should be more clearly understood. Three dissenting judges (Weeramantry, Koroma, and Shahabuddeen) did not vote with the majority in the fifth holding because they wanted a broader declaration of illegality in all circumstances and did not feel the survival exception was a warranted outcome. As Professor Weston has correctly observed, the position of the court tilts in the direction of the unlawfulness of the threat and use of nuclear weapons (functionally a ten to four vote).<sup>170</sup> The other perspectives are sufficiently disparate that, according to Weston, these opinions in effect "lacked any real coherence" as dissenting voices.<sup>171</sup> Taking the "tilting" toward unlawfulness interpretation of issue five, the sixth holding<sup>172</sup> was, as indicated, unanimous, and yet it provides an important point of pressure on the tilt toward illegality. According to the court, "[t]here exists an obligation [under Article VI of the 1968 NPT] to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in

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165. See Burns H. Weston, *Nuclear Weapons and the World Court: Ambiguity's Consensus*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 371 (1997) (arguing for a nuanced interpretation of the ambiguities inherent in the court's opinion).

166. See *id.* at 389.

167. *Legality of Nuclear Weapons*, 1996 I.C.J. at 237.

168. See Weston, *supra* note 165, at 390.

169. *Legality of Nuclear Weapons*, 1996 I.C.J. at 267.

170. See Weston, *supra* note 165, at 383-84.

171. *Id.* at 383.

172. See *Legality of Nuclear Weapons*, 1996 I.C.J. at 267.



all its aspects under strict and effective international control.”<sup>173</sup> The principle of good faith is one of the foundational principles of world order, and the expectation of good faith is the legal foundation of that world order.

The obligation to cooperate to achieve the purposes of world constitutional order is tied to the foreseeable processes of recognition (membership in the Charter system) and even derecognition, for that matter. At the heart of the international obligation to cooperate is, of course, the good faith principle. In the *Nuclear Tests Case*, the court gave explicit recognition to the good faith principle.<sup>174</sup> France had made a unilateral communication through an authorized ministry that its testing program had come to an end. The court accepted this statement as a fact of vital juridical salience. Because France had in good faith indicated that its testing program was over, the object and purpose of the case was removed. The case was accordingly dismissed. The Declaration on Friendly Relations<sup>175</sup> gives a concrete form of expression to this critical principle. The court thus has seized on the juridical character of a continuing good faith obligation whose prime objectives are “nuclear disarmament in all its aspects” and that this *must* be pursued under “strict and effective international control.”<sup>176</sup> However, the obligation to cooperate means coordinating activities at all levels of decision-making. If this is right, the court has sought to mediate strategically between licit juridical major purposes and the tactical and strategic means of expeditiously realizing them. This is neither hortatory nor an abdication of the judicial function. It is a wise course of directed normative guidance with a strong juridical imprimatur.

The six substantive holdings tell us a great deal about the delicate pragmatism the court has used in responding to the requests for an advisory opinion. The court’s prudential exercise of pursuing the legal discourse to what it conceives to be the prudential limits of its judicial competence inevitably involves compromise. However, the holdings also incorporate a strong effort to shift a positivist paradigm of international law (law as it is) to a paradigm suggesting that law is not static, but is evolving and must also account for expectations of change. The court has effectively provided a

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173. *Id.*

174. *See Nuclear Tests Case (Aust. v. Fr.)*, 1974 I.C.J. 252 (Dec. 20). In that case, the court found:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule or *pact sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

*Id.* at 268.

175. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

176. *Legality of Nuclear Weapons*, 1996 I.C.J. at 267.

mediating standard which confirms the continuing relevance of international legal tradition in light of new facts. The application of law to new facts, over time, involves the critical structural constraint of practical, reasoned elaboration. This view of the judicial role is consistent with the Grotian tradition. To be sure, the soft *Lotus* position of the court on survival, self-defense, extreme circumstances, and state sovereignty provides a weaker Grotian predicate than the one proffered in Judge Weeramantry's dissent.<sup>177</sup> It is arguable that the gulf is not merely a middle ground but one premised upon a pragmatic estimation of the molecular aspect of legal change. It is also possible to construe the fifth holding as imposing such a high threshold of justification on the issue of survival that what is left to the future is only a theoretical loophole.

### C. *The Substantive Appraisal of the Advisory Opinion*

The focus on the substantive holdings of the court provides us with a sharp insight into the issue of the role and competence of the court from a practical perspective. It is, however, also important to consider more carefully the structure of the reasoning of the court on the various aspects of international law and nuclear arsenals. In the structure of its reasoned elaboration, we see the careful delineation of the boundaries of the role of the court itself. In terms of the court's opinion, the most fundamental problem posed by nuclear weapons relates to the protection of human life on the planet: the right to life. The court quotes Article 6 of the International Covenant on Civil and Political Rights, which provides the following: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."<sup>178</sup> The meaning of this latter phrase, it was held, had to be construed in light of the law of armed conflict. This effectively means that Article 6's prescriptive force may be limited by the prospect that a justification exists for the use of nuclear weapons under the law of armed conflict.

A further concern about construing the right to life in this context is that the term "arbitrary" in Article 6 could conceivably be given a more limited meaning that derives from the law of armed conflict and that may posit a "reasonable" grounds argument in which the permissibility of a nuclear weapon depends upon its size. Since this is a pretty elastic operational standard, it represents an important loophole in the analysis. Moreover, if "reasonable" encompasses the meaning "arbitrary," the meaning of the right to life in human rights law is weakened. This interpretation would indeed be troubling from both a humanitarian and a human rights law point of view. From a humanitarian point of view, it would be better to limit the circumstances under which humanitarian law may be undermined by giving a reasonably expansive gloss to the concept and meaning of the word

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177. See *id.* at 433 (Weeramantry, J., dissenting).

178. *Id.* at 239 (quoting International Covenant on Civil and Political Rights, *supra* note 52, art. 6, para. 1).

"arbitrary." From a human rights point of view, it would be disastrous to weaken the meaning of "arbitrary," particularly when we consider, as Professor R.J. Rummel has indicated, that murder by government has reached epidemic proportions (between 1900 and 1986, he noted 170,000,000 murders by government).<sup>179</sup>

The Genocide Convention is also given a cautious relevance.<sup>180</sup> Its applicability is triggered if and only if an intent exists to destroy, in whole or in part, a specific group or subgroup, as specified in the definition of genocide.<sup>181</sup> According to the court, "a determination would have to be made as to applicability after having taken due account of the circumstances specific to each case."<sup>182</sup> This seriously weakens the prescriptive force of the Genocide Convention in that it ignores the "prevention" element of the Convention<sup>183</sup> and focuses mainly on the punishment phase.<sup>184</sup> One might suggest that the court has given the Convention's prescriptive force a restrictive meaning.

In the court's canvass of the context of possible environmental consequences relating to the use of nuclear weapons, the court found that the prescriptions and policies relating to environmental protection also had to account for the right of self-defense, as well as the "necessary" and "proportionate" limits of permissible coercion.<sup>185</sup> The court determined that "existing international law relating to the protection . . . of the environment [did] not specifically prohibit the use of nuclear weapons."<sup>186</sup> The court did, however, point out that existing international law indicates "important environmental factors [to be] taken into account in a context of . . . the principles and rules of law applicable in armed conflict."<sup>187</sup> The court concluded that the law and policy relating to the integrity and viability of the Earth-space ecosystem is only of indirect relevance to the question of the lawfulness of the threat or use of nuclear weapons.<sup>188</sup> The idea of an ecosystem made uninhabitable to man and possibly all other major life forms

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179. See R.J. RUMMEL, *DEATH BY GOVERNMENT* 9 (1994). Rummel writes:

In total, during the first eighty-eight years of this century, almost 170 million men, women, and children have been shot, beaten, tortured, knifed, burned, starved, frozen, crushed, or worked to death, buried alive, drowned, hung, bombed, or killed in any other of the myriad ways governments have inflicted death on unarmed, helpless citizens and foreigners. The dead could conceivably be nearly 360 million people. It is as though our species has been devastated by a modern Black Plague. And indeed it has, but a plague of Power, not germs.

*Id.*

180. See *Legality of Nuclear Weapons*, 1996 I.C.J. at 240.

181. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

182. *Legality of Nuclear Weapons*, 1996 I.C.J. at 241.

183. See Genocide Convention, *supra* note 181, art. I (providing that the contracting parties "undertake to prevent and to punish" genocide).

184. See *id.* arts. III-IV.

185. See *Legality of Nuclear Weapons*, 1996 I.C.J. at 242.

186. *Id.* at 243.

187. *Id.*

188. See *id.*

might incite a more generous construction of the rules of international environmental law—and not simply in light of the *ius in bello*.

This aspect of the court's opinion is important because of its canvass of important sources of law and their appropriate interrelations. The right to a viable ecosystem, the right to life, and the right to suppress and punish genocide are relevant factors in determining what is lawful in the nuclear context. International law and contemporary moral order may hold expectations that expand these boundaries more generously than the ICJ's interpretive gloss. Since these prescriptions are of only indirect relevance to the question for which an advisory opinion was sought, the next important phase of the opinion addresses the state of the law most directly relevant to the issue.

In this regard, the court finds what one might call the "hard law" relating to the problem. The hard law is what governs the use of armed force, enshrined in the U.N. Charter. Other directly applicable law includes the rules of the wider body of international law applicable to armed conflict and that which regulates the conduct of hostilities. The court also identifies the hard law treaty regime relating to nuclear weapons. In this context, the court notes the unique character of nuclear weapons and their "potential to destroy all civilization and the entire ecosystem."<sup>189</sup> The court notes that Article 2(4) (prohibition of aggression) and Article 51 (self-defense) of the Charter do not refer to any specific weapons or weapon systems.<sup>190</sup> The court further notes that Article 42, which authorizes the Security Council to use military force, similarly is silent on the question of weapons and weapon systems.<sup>191</sup> The court thus concluded that the Charter does not explicitly proscribe or sanction the use of any specific weapon, "including nuclear weapons."<sup>192</sup> This analysis may be contrasted with Judge Weeramantry's construction of the principal purposes of the Charter as indicated, *inter alia*, in the Preamble itself.<sup>193</sup>

189. *Id.*

190. *See id.* at 244.

191. *See id.*

192. *Id.*

193. *Id.* at 433 (Weeramantry, J., dissenting). The Preamble states:

We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and . . . to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security . . . have resolved to combine our efforts to accomplish these aims.

U.N. CHARTER pmbl. Article 1(1) of the U.N. Charter provides that the purposes of the United Nations include:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . . .

*Id.* art. 1, para. 1. Article 1(2) of the U.N. Charter provides that a further purpose is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.* art. 1, para. 2.

The court finds the basis for the possible licit use of nuclear weapons in Article 51, although that article under both customary and contemporary practice is subject to the general constraints in international law concerning the use of force (namely, the principles of necessity, proportionality, as well as the principles of humanitarianism). What then are the circumstances under which a state may have recourse to the use of nuclear weapons under Article 51?

The court's reasoning is not absolutely clear. The reasoning seems to have some affinity with the principle expressed in the *Lotus* case that restrictions on sovereignty ought not to be presumed.<sup>194</sup> It seems that sovereignty is conflated with national security, which in turn may be given a textual gloss through the word "inherent," as reflected in Article 51. According to the court, "it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by states believing they can exercise a nuclear response in self defense in accordance with the requirements of proportionality."<sup>195</sup>

The reader will recall that McDougal and Schlei relied upon the principle of self-defense to justify the testing of the hydrogen bomb in the South Pacific.<sup>196</sup> However, their argument was predicated upon the conception of a global crisis, assumptions about the free world and tyranny, and assumptions about the need for democracies to assert the right to defend peace, security, and democratic values. Whatever the reality then, these same considerations cannot be sustained in the post-Cold War world, where the major powers are unlikely to use nuclear weapons intentionally. Modern considerations surrounding nuclear weapons include whether irresponsible terrorist groups and renegade states will use them and whether accidents, technological failures, or simply human error may trigger a catastrophe.

In short, the invocation of the reasonableness standard in the context of Article 51-based claims seems out of date. The court's analysis might have been more informative if a more careful contextual appraisal of the world order (as it relates to the distribution of power) and the threats to international peace and security had been made. If this had been more carefully done, it would have been difficult to divine a reasonable circumstance in which "survival" would not actually mean mutually assured destruction.<sup>197</sup> In fact, it

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194. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A.) No. 10, at 18 (Sept. 7).

195. *Legality of Nuclear Weapons*, 1996 I.C.J. at 245.

196. See McDougal & Schlei, *supra* note 56, at 682-90.

197. See, e.g., Peter Weiss, *The World Court Tackles the Fate of the Earth: An Introduction to the ICJ Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 313, 325-26 (1997). Weiss states:

[T]he narrowness of the possible "extreme circumstance" exception becomes clear when one considers the meaning of "the survival of a state." There are only two conditions in which a state can be said to die: the physical destruction of all or virtually all of its inhabitants, or the absorption of all or virtually all the functions of its statehood by

is hard to imagine a nuclear weapons response as a rational self-defense measure for survival except in the most abstract of circumstances.<sup>198</sup>

The court also examines the scope of treaty law and customary international law relating to the use of force and the role of nuclear weapons.<sup>199</sup> The court's interpretation of treaty law is almost reminiscent of the principles of strict construction.<sup>200</sup> The interpretive question asked is whether a treaty or other explicit textual basis in treaty law exists for outlawing nuclear weapons on a universal basis. The court concludes that, taken as a whole, the present treaty regime simply does not go that far.<sup>201</sup> The court points out that these treaties are crafted too specifically to support the conclusion that there is a universal ban on the use, or threat of use, of nuclear weapons, however desirable such an interpretation may be.<sup>202</sup> In short, the court does not find "any specific prohibition" in any of the specific treaties.<sup>203</sup>

Reisman believes that the court's opinion "raises doubts about the cogency of the new [treaty] regime and revives the legitimacy of claims to use nuclear weapons for exclusive national purposes."<sup>204</sup> He continues: "[I]f international law does not hold definitely that the use of nuclear weapons by a state in extreme circumstances of self defense is illegal, what is the court saying to security specialists in states that feel they are under significant threat?"<sup>205</sup> The conclusions of the court (in particular, Conclusion 2(E) of the *dispositif*) tend to legitimize the use of nuclear weapons for discrete national purposes in what the court described as "an extreme circumstance of self-defence in which the very survival of a State may be at stake."<sup>206</sup> Of course, security specialists become security specialists because there are many contingencies that affect what they mean by survival; often the self-perception of survival can be a very convenient, if not self-serving, assertion. On the other hand, in a world of heightened ethnic and national conflicts, few national groups exist that do not believe that their survival is a constant political problem. The questions are whether their efforts to acquire and possibly use nuclear weapons for *their survival* do not severely compromise

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another political entity. It strains credulity to conceive of any of the avowed nuclear weapon states finding themselves in either of these scenarios.

*Id.*

198. See WITTNER, *supra* note 43, at 35 (writing that "many of the scientists considered it futile to try to preserve national security on a long-range basis through weapons of war . . . contend[ing] that in the context of competing nations, the Bomb would eventually undermine national security and bring the world to ruin").

199. See *Legality of Nuclear Weapons*, 1996 I.C.J. at 244-55.

200. The court's approach to interpretation in this context seems inconsistent with a more generous theoretical goal-oriented approach to interpretation.

201. See *Legality of Nuclear Weapons*, 1996 I.C.J. at 253.

202. See *id.*

203. *Id.* at 248.

204. See Reisman, *supra* note 92, at 483.

205. *Id.*; see also PAINE & MCKINZIE, *supra* note 132, at 3. The authors write that the U.S. government is planning to "significantly expand its base of nuclear weapons knowledge by building extensive above-ground experimental (AGEX) facilities for nuclear weapons physics and conducting underground high-explosive experiments with plutonium and other nuclear materials at the Nevada Test Site." *Id.* The government is also planning measures to develop and upgrade its nuclear stockpile. See *id.*

206. *Legality of Nuclear Weapons*, 1996 I.C.J. at 266.

the planet's survival, and whether, in such cases, security can be achieved by less risky and more reasonable strategies of self-defense. The full implications of the court's holding might better be appreciated if the court's specific language is again quoted in full:

[I]n view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.<sup>207</sup>

The opinion of the court and, in particular, the specific conclusion will undoubtedly satisfy few discerning observers of international law and proponents of the court's role in law's development. For lawyers who see a more circumscribed role for international law and, in particular, a limited role for international lawmaking in the strict juridical sense of judge-made law, the court's opinion simply goes too far. It trenches upon the sensitive issue of judicial self-limitation in an area in which the stakes, in an immediate sense, are charged with high politics.

On the other hand, there are those who believe that the nuclear weapons issue is one of the most central and defining questions about the being and becoming of humanity, and that central to these questions are the values that fundamentally secure humanity and world order. These values reflect deeply upon the history and tradition of international law and are reflected most concretely in the general constitutional scheme of the Charter system, explicit normative guidance of which is to be found in the very preamble and statement of purposes of this organizing instrument of world order. Still a third view is possible. This view sees, in the court's careful analysis of the corpus of substantive law that is affected by the nuclear weapons problem, that there is a great deal in this conversation that is amenable to the reasoned elaboration of the law. The question is: Is such reasoned elaboration a meaningful contribution to a problem that is usually communicated and discussed in the most non-transparent ways? This, of course, is characteristic of most matters that fall within the domain of claims to national security as they are often rationalized under the self-defense principle of Article 51.

The ICJ's contribution may be seen as a way of partially preempting the process of how we might responsibly think about nuclear weapons and what we might do to secure their eventual elimination. From this point of view, the decision reflects a combination of both prudence and an appreciable moral sensibility that informs the technical legal analysis. We cannot after all completely separate strict law from the dictates of conscience and decency. The specific paragraph, which I have quoted in full, contains a statement that the court cannot unequivocally reach a conclusion about "the legality or illegality of the use of nuclear weapons . . . in an extreme circumstance of

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207. *Id.* at 263.

self-defense,"<sup>208</sup> in the context of a survival situation. This is from a doctrinal point of view an effort to acknowledge the problems of sovereignty, security, and self-defense.

Perhaps the problem posed in the statement should be teased out further to determine exactly the contextual indicators of an extreme circumstance as well as the indicators of the notion "very survival."<sup>209</sup> These indicators must be evaluated against the risks that nuclear weapons pose for human survival. Perhaps then the notion of sovereignty might well be subordinated to the notion of the self-defense, so to speak, of the planet as a whole as well as the very survival of the planet as a whole. From a pragmatic point of view, it may still be the case that the sovereign members of the nuclear club still wish to retain a residuum of reliance on nuclear weapons as a supposed deterrent. However, this rationale seems to be getting weaker and weaker in light of the regime of nonproliferation and the international obligations that envision the subordination of sovereignty to the special regime of nonproliferation.

#### D. *The Dissenting Opinion of Judge Weeramantry*

Judge Weeramantry's dissenting opinion is an illustration of Grotian jurisprudence at its finest. At the heart of the opinion is the principle that nuclear arsenals are simply incompatible with the idea of law, legality, and reasoned elaboration. It may thus be of value to assay some aspects of the Weeramantry dissent in terms of the more general issue concerning the future role of the international lawyer. This issue is related to a central question implicit in this Essay; namely, how far and to what extent lawyer interventions will improve our understanding of the role of nuclear weapons in the context of changing world order patterns. This question is a matter that deeply implicates the fundamental values of the role, function, identity, and responsibility of a learned profession. Additionally, what effective legal strategies can be employed to secure the agreed-upon objective of complete nuclear disarmament and to secure a clear, legal, and moral basis for holding that the threat and/or use of nuclear weapons is quite simply a violation of international law?

In this context, it seems there are two vitally important technical matters that international lawyers must resolve among themselves. Having done so, the international lawyers must then find the means to communicate these resolutions to both the political and the relevant technological and scientific communities. The first matter concerns the scope of international law. Is the regime of nuclear weapons subject only to the law of the *lex specialis*, or are there broader sources of law that must inform this critical legal conversation?

In the dissenting opinion of Judge Weeramantry, it is strongly urged that the range of applicable international law is not confined to the *lex specialis* of treaty law. The Judge recognizes the sources of law to include:

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208. *Id.*

209. *Id.*



1. The international law applicable generally to armed conflicts—the *jus in bello*, sometimes referred to as the “humanitarian law of war.”
2. The *jus ad bellum*—the law governing the right of States to go to war. This law is expressed in the United Nations Charter and related customary law.
3. The *lex specialis*—the international legal obligations that relate specifically to nuclear arms and weapons of mass destruction.
4. The whole corpus of international law that governs State obligations and rights generally, which may affect nuclear weapons policy in particular circumstances.
5. National law, constitutional and statutory, that may apply to decisions on nuclear weapons by national authorities.<sup>210</sup>

Both the majority opinion and Judge Weeramantry's dissenting opinion have embraced a *broader* view of what international law is, and, therefore, have in effect sanctioned a broader role for the international lawyer in world order matters. It is obvious, however, that Judge Weeramantry's list of “sources” suggests that we must broaden our “sources” base for international adjudication to keep abreast of the critical problems of world order amenable to judicial interventions. I would suggest that this is more than simply giving Article 38 of the ICJ Statute a generous construction as to the relevant, authoritative sources of international law.<sup>211</sup> It may be that we are also in search of a more useful theory about the sources of international law. W. Michael Reisman, for example, anticipated just such an eventuality in his piece, *International Lawmaking: A Process of Communication*, in which he sought to provide a practical perspective drawn from communications theory about how international law is *functionally* created.<sup>212</sup> Professor Reisman suggested that attention be given to the identity of both communicator and target audience.<sup>213</sup> He also suggested that, from an observer's view, careful appraisal be given to the “authority signal,” the “controlling intention,” and the “policy content” of a relevant flow of communications.<sup>214</sup> These theoretical ideas may find fertile ground for reflection in practical contexts of international decision-making. This, of course, impacts upon how broadly or narrowly the lawyer role is conceived.

The second central issue is that of interpretation. Assuming *arguendo* that Judge Weeramantry is correct about the breadth of the sources of international law relevant to the problem, what kinds of explicit, normative guidance can the interpreter invoke regarding the specific prescription and application of international law? Here the U.N. Charter preamble, as an

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210. *Id.* at 443 (Weeramantry, J., dissenting).

211. *See* Statute of the International Court of Justice, art. 38.

212. *See* Reisman, *supra* note 60, at 101.

213. *See id.* at 107.

214. *Id.* at 108 (citing Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249, 250 (1980)).

instrument of goal guidance as well as goal clarification, is most useful and insightful.

In his dissenting opinion, for example, Judge Weeramantry sought to ground the problem in the context of "six keynote concepts" which embody the global community's fundamental expectations about global constitutive and public order priorities.<sup>215</sup> These concepts are vital if the interpretation of international law is to be guided by explicit standards of normative understanding. In short, the interpretation of international law (i.e., its specific prescription and application) may be rootless, arbitrary, and even quixotic if it is not subject to explicit standards of normative guidance, which are expressed in concrete terms in the U.N. Charter taken as a whole.

The opening of the preamble expresses the first standard—that the Charter's authority is rooted in the perspectives of *all* members of the global community, i.e., the peoples. This is indicated by the words, "[w]e the peoples of the United Nations."<sup>216</sup> Thus, the authority for the international rule of law, and its power to review and supervise the nuclear weapons problem is an authority not rooted in abstractions like "sovereignty," "elite," or "ruling class," but in the *actual* perspectives of the people of the world community. This means that the peoples' goals, expressed through appropriate fora, including the United Nations, governments, as well as *public opinion*, are critical indicators of the "principle of humanity" and the "dictates of public conscience" as they relate to the conditions of war (methods and means).

The Charter's second key concept embraces the high purpose of saving succeeding generations from the scourge of war.<sup>217</sup> The drafters clearly did not envision nuclear war in reference to the concept of war here. Nonetheless, as the passage contemplates the destructiveness of war, an enhanced technological capacity for destructive weapons would enhance the relevance of this provision, not restrict its scope. This reflects a reasonable legal interpretation.

The third keynote concept is the reference to the "dignity and worth of the human person."<sup>218</sup> In blunt terms, the eradication of millions of human beings with a single weapon hardly values the dignity or worth of the human person. What is of cardinal legal, political, and moral import is the idea that international law based on the law of the Charter be interpreted to enhance the dignity and worth of all peoples and individuals, rather than be complicit in the destruction of the core values of human dignity.

The fourth keynote concept in the preamble is emphatically anti-imperialist. It holds that the equal rights of all nations must be respected. Nuclear power institutionalizes hegemony (nuclear umbrellas) and destabilizes interstate relations as states face the "need" to possess their nuclear arsenal in order to deter the other states from contemplating the deployment or use of their own arsenal.

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215. See *Legality of Nuclear Weapons*, 1996 I.C.J. at 443 (Weeramantry, J., dissenting).

216. U.N. CHARTER pmbl.

217. See *id.*

218. *Id.*

The fifth keynote in the Charter preamble refers to the obligation to respect international law based not only on treaty commitments, but also on "other sources of international law."<sup>219</sup> The entire framework of nuclear weapons perspectives and operations cannot proceed outside of the very idea of "law," or more precisely, the law of human survival that must be the foundational precept of modern international law.

The sixth keynote point in the preamble of the Charter contains a deeply rooted expectation of progress, improved standards of living, and enhanced domains of freedom. Extinction or the prospect of extinction of the human species is hardly consistent.

These standards may influence the strategies of legal argument and legal justification concerning the legality of nuclear weapons. One strategy would be to take the facts and logic of nuclear weapons and to show in light of these keynote concepts, after the fashion of natural lawyers, that there is nothing reasonable in the threat of the possible extinction of the entire eco-social process. Another stratagem may be to give a cautious assessment of the available corpus of law, in light of the keynote concepts, and to appeal for caution and seriousness if states feel compelled to have recourse to nuclear weapons, in conduct and operations that are on their face ostensibly incompatible with those keynote expectations. A third approach would be to simply acknowledge that the issue of nuclear weapons is *sui generis*. To do this, one would have to ignore the normative guidance of the keynote concepts and have a great deal more faith in what states have actually achieved so far.

## VI. CONCLUSION

The question of the lawfulness of the threat or use of nuclear weapons before the ICJ has allowed the court the opportunity to enlarge and focus the legal discourse on a vital issue of world order. In so doing, the court has established a juridical structure for the problem. This structure secures a process of reasoned elaboration that is more in keeping with the Grotian tradition than the tradition of state-dominated positivism. I believe that a more generous interpretation of the relevant sources, including the treaty obligations, and a highly restrictive view of reasonable self-defense, will provide us with a better working picture of how we must proceed expeditiously to clear the Earth of the menace of nuclear weapons. A still more realistic picture of the legal character of the problem of nuclear weapons emerges from Judge Weeramantry's dissent. Quite simply, nuclear weapons point to a legal limit on the capacity for universal destruction. They cannot be reconciled with the fundamental keynote expectations of the U.N. Charter and modern international law. They are or should be unlawful.

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219. *Id.*

